No. 997

In the

Supreme Court of the United States

H. M. HAMMONTREE, JR., et al.,

Petitioners,

v.

THE STATE OF TEXAS,

Respondent.

No. ____

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

H. M. HAMMONTREE, JR.

SUBJECT INDEX

	Page
Caption	1
Opinions of the Courts below	
Trial Court	A-1
Court of Civil Appeals	A-8
Supreme Court of Texas	A-55
Grounds of Jurisdiction of this Court	2
Questions Presented for Review	
1. Unconstitutionality of Texas Art. 6036	3
2. No due process in assessing fine on basis not plead	4
3. Equal protection denied to Petitioners on discovery proceedings	4
4. Due process denied in refusing jury right to pass on disputed facts	4
5. Television and press releases deny Petitioners due process	4
Texas Statute whose validity is questioned	5
Statement of the Case	6
Time at which Federal Question was raised	12
Reasons relied upon for the Writ	14
Conclusion and Prayer	18

APPENDIX INDEX

	Page
Opinion of the Trial Court (R. Item II, pp. 617-623)	A-1
Judgment of the Trial Court (R. Item I, p. 213)	A-4
Opinion of the Court of Civil Appeals (Officially reported in 385 S.W. 2d 411-R. Item IV)	A-8
Opinion of the Supreme Court of Texas (Officially reported in 407 S.W. 2d 467-R. Item X)	A-55
Dissenting Opinion of the Supreme Court of Texas (Officially reported in 407 S.W. 2d 479-R. Item XI)	A-80
Judgment of the Supreme Court of Texas (R. Item XII)	A-81
Order of the Supreme Court of Texas overruling Motion for Rehearing (R. Item XV)	A-83

No. .....

In the

Supreme Court of the United States

H. M. HARRINGTON, JR., et al.,

Petitioners,

v.

THE STATE OF TEXAS,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Texas

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To: The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

H. M. Harrington, Jr., Charles W. Lutes, Reid H. Allgood and J. W. Baton, residents of the State of Texas and citizens of the United States, Petitioners herein, file this their petition praying that a Writ of Certiorari issue to the Supreme

Court of the State of Texas to review the judgment of such state court of last resort. The Respondent is the State of Texas represented by its Attorney General.

OPINIONS OF THE COURTS BELOW

The judgment of the trial court based on an unconstitutional Texas statute assessing penalty fine of $304,800.00 against these Petitioners, is not reported in any official reporter but is shown in the record (R. Item I, p. 213) and a copy appended, page A-4. The trial court opinion is shown in the appendix, page A-1. The intermediate appeal was to the Court of Civil Appeals for the Third Judicial District at Austin, Texas, whose opinion is officially reported in 385 S.W. 2d 411, and a copy of such opinion reversing $292,000.00 of the trial court's judgment because such court found "no evidence" to support it, appears in the appendix, page A-8. The opinion of the Supreme Court of the State of Texas is officially reported in 407 S.W. 2d 467. A copy of such opinion reversing the Court of Civil Appeals' decision and affirming the trial court's judgment is copied in the appendix, page A-55. The Supreme Court's dissenting opinion is shown in appendix at page A-80.

GROUNDS OF JURISDICTION OF THIS COURT

The date of the decree of the Supreme Court of Texas is October 12, 1966, (R. Item X, Appendix, p. A-79) and the date upon which the decree became final was November 16, 1966, the date upon which Petitioners Motion for Rehearing was overruled. (R. Item XV, Appendix, p. 83).

This Honorable Court has jurisdiction to review the decree of the Supreme Court of Texas, which is the highest

court of the State of Texas, under the provisions of Title 28, United States Code Annotated, Section 1257(3), granting jurisdiction if "the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution** of the United States"; and to a cause where a "right, privilege or immunity is specially set up or claimed under the Constitution."

The following cases are believed to sustain the jurisdiction of this Court: *U.S. ex rel. Bryant v. Fay*, 211 F. Supp. 812, certiorari denied 375 U.S. 852, 84 S. Ct. 111, 11 L. Ed. 2d 79; *Perkins v. State of North Carolina*, 234 F. Supp. 333; *Goss v. Bomar*, 337 F. 2d 341; *Redding v. Pate*, 220 F. Supp. 124; *Douglas v. City of Jeannette*, 130 F. 2d 652, affirmed 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324.

QUESTIONS PRESENTED FOR REVIEW

1. Is Article 6036, Texas Revised Civil Statutes, providing for fines and penalties for violation of a Texas governmental agency's order, of $1,000.00 per day "for each and every day of such violation and for each and every act of such violation" under which the State of Texas sought a fine of $3,667,000.00, and the Texas courts assessed a fine of $304,800.00 *unconstitutional* as being in violation of Amendment XIV, Sec. 1, guaranteeing "due process" by State courts against imposition of fines violating the intent of Amendment VIII of the United States Constitution providing "excessive bail shall not be required, nor excessive fines imposed, or cruel or unusual punishments inflicted"?

2. Whether the fact that the Texas Courts imposed a fine and penalty on a basis entirely different from the pleadings, was in conflict with the "due process" guaranteed to each citizen of the United States by Amendment XIV of the United States Constitution providing that "no State shall make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."?

3. Whether the fact that the Texas Courts refused to allow the Petitioners the equal use of discovery procedure (Same as Federal Civil Procedure Rule 33) was in conflict with the "equal protection" guaranteed to each citizen of the United States by Amendment XIV of the United States Constitution, providing that "no State shall make or enforce any law which shall abridge the privilege or immunities of any citizen of the United States, nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."?

4. Although Amendment VII of the United States Constitution guarantees the right of trial by jury in Federal proceedings, does the denial of such right in a Texas court deny to a person "due process" guaranteed by Amendment XIV of the United States Constitution where in similar cases the State of Texas would permit a jury to pass on all fact issues?

5. Whether or not the mass of television reports and press releases made or permitted by the Attorney General,

representing the Respondent in this case, were so broad and excessive as to deprive these particular Petitioners of a fair and impartial trial guaranteed to them under the "due process" clause of Amendment XIV of the United States Constitution?

TEXAS STATUTE WHOSE VALIDITY IS QUESTIONED

The Article in question in its present form is shown in the Official Acts of the Texas Legislature as House Bill No. 782, Acts 1935, 44th Legis. Chapter 76, page 180. A copy of the statute is appended to the first page of the opinion of both the Supreme Court of Texas and the Court of Civil Appeals, shown in the appendix, and is as follows:

> "In addition to being subject to any forfeiture that may be provided for by law and to any penalty that may be imposed by the Commission for contempt for the violation of its rules, regulations, or orders, any person violating any of the provisions of this Act or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or violating any rule, regulation, or order of the Commission promulgated thereunder, shall be subject to a penalty of not more than One Thousand Dollars ($1000) for each and every day of such violation, and for each and every act of such violation, to be recovered in any Court of competent jurisdiction in Travis County, or in the county of the residence of the defendant or, if there be more than one defendant, in the county of the residence of any of them, or in the county in which the violation is alleged to have occurred, such suit by direction of the Commission to be instituted and conducted in the name of the State of Texas by the Attorney General or by the county or district attorney where such suit is brought. The recovery or payment of any such penalty shall not authorize the

violation of any provision of this Act, or Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation or order of the Commission promulgated thereunder.

"Any person aiding or abetting any other person in the violation of this Act, or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation, or order of the Commission promulgated thereunder, shall be subject to the same penalties as are prescribed herein for violation thereof by any such other person."

STATEMENT OF THE CASE

This cause is one of more than a hundred filed by the State of Texas in the 53rd District Court of Travis County, Texas, seeking fines or penalties totaling almost a half billion dollars, brought under a Texas Statute (Article 6036, Texas Revised Civil Statutes) for alleged violations of rules, regulations or orders issued by the Texas oil administrative body, the Railroad Commission of Texas. By this particular case, which is the only one that has actually had a contested trial, the State of Texas sought penalty fines of $1,000.00 per day for 3,650 days, or 3,667 separate claimed violations, for a total fine of $3,667,000.00. The fines actually assessed were $304,800.00.

This case is, therefore, of paramount importance to all of the people of the State of Texas. It will determine whether "due process" and the "equal protection of the laws" and a truly unconstitutional act of the Texas legislature shall be the rule of law hereafter applied in the State of Texas to the almost one hundred cases that remain to be determined. This is a case of paramount importance.

This Texas statute under which the State of Texas sought to impose such fine of $3,667,000.00, without the necessity of showing either *scienter*, intent, or knowledge, is believed to be unconstitutional if our Federal Bill of Rights, as set forth in the Amendments to the United States Constitution, means what it says in guaranteeing each person "equal protection" and "due process" against the assessment of "excessive fines and unusual punishment".

Not only is this Texas Statute unconstitutional, but the method followed by the State of Texas in its assessment of such fine denied to the Petitioners all their fundamental rights to "due process" and "equal protection" guaranteed to each person by Amendment XIV of the United States Constitution.

The Petitioners were not permitted to have a jury pass upon the facts in the case, but the jury heard only the Respondent's evidence, returned its verdict, was excused, and the Court then heard additional evidence covering certain essential elements of the case not presented in the presence of the jury. This is not "due process". These Petitioners were not only thus *denied a trial by jury*; but they *were not advised of the charges made* against them as the judgment pronounced by the Court was on *a basis entirely different from the pleadings* upon which the case was tried, thus again denying "due process". These Petitioners were denied the "equal protection of the laws", in that they *were denied* the right to the use of the *same rules* of procedure as was granted to the Respondent. The case was tried in the face of such massive adverse publicity, press releases, and television coverage as

to deprive a citizen of a fair trial. May a State thus deprive a citizen of all his Federal rights, or does this Honorable Court uphold the guarantees of the United States Constitution?

This is a civil suit for penalties brought by the State of Texas against the four Petitioners and one other not here involved, under the provisions of Article 6036 of the Texas Revised Civil Statutes as amended in 1935 for alleged violations of the Texas oil regulatory administrative body, the Railroad Commission of Texas, claiming violations of either its Statewide Rule No. 37, or its Statewide Rule No. 54, or its special Hawkins Field Rule No. 1, claimed to have been violated by the Petitioners with an alleged deviated oil well in the Hawkins Oil Field of Texas, such violations *alleged in the pleadings* to have occurred "by virtue of *drilling* said crooked oil well No. 1 and by virtue of *producing oil* by means of said crooked well". (Record, Item I, p. 50—copied in full in opinion of Court of Civil Appeals, Appendix, p. A-18).

Upon the trial, the Respondent offered proof of a very new and technical scientific (gyroscopic) method of well bore surveying inside of small steel well casing from which the jury found the well to be deviated; and that finding of fact is not here contested. The Respondent offered *no proof* on the following essential and necessary elements for the judgment entered:

(1) *No proof* whatever was offered before the jury as to the number of "drilling" days for which a penalty fine was assessed;

(2) *No proof* whatever was offered before the jury as to the number of days the well was "producing oil" for which the pleadings sought a penalty fine; and

(3) *No proof* whatever was offered as to "scienter" on the part of the Petitioners sought to be fined.

In the trial court, at the close of the Respondent's proof, the Petitioners moved for judgment based on the total lack of proof on these essential elements; and being overruled (R. Item I, pp. 103, 106, 111) rested; and the jury returned its verdict finding the well deviated and fixing a "drilling" fine at $800.00 per day for 16 days and a fine of $80.00 per day for 3,650 days for "operating" such well. (R. Item I, pp. 142-143).

After the jury was discharged, the trial court then heard evidence as to the "number" of days involved and entered judgment on a new basis—not plead—that the well was "not plugged". (R. Item I, p. 617—Appendix, p. A-3). The trial court judgment (R. Item I, p. 213) is shown in appendix, at page A-4.

As stated above, there was no evidence on the number of drilling days. Before the jury, the Respondent made the following limited offer of an Exhibit (R. Item III, Exhibit 14) which reflected the date the well was completed. The offer of this Exhibit to the jury was for a limited purpose only, as follows: (R. Item II, p. 20).

> "Your Honor, at this time I offer only for the purpose of showing the instrument was filed, but not for the truth of the matters shown in the instrument Plaintiff's Exhibit No. 14, which is a Form 3 on Well No. 1

> of T. P. Coal & Oil Company Lease, the well potential test, dated the 28th of April, 1952."

In the same fashion, the Respondent limited its offer of what is known as Railroad Commission Form 2 (R. Item III, Exhibit 13) which purports to show the time of beginning and the date of completion of the well—not the actual days spent in drilling—and it was offered before the jury under the following limited offer: (R. Item II, p. 19)

> "Your Honor, at this time we offer into evidence Plaintiff's Exhibit 13 which is a—we offer it only for the purpose of showing the information which is on the exhibit and not for the truth of the exhibit—it is Form 2 well record dated April 28, 1952."

The Respondent having failed to make out a case of multiple violations, the Petitioners rested without offering any proof and the jury having found the well deviated, a finding which is not in any way contested, on motions for judgment, the defect in the lack of evidence to support multiple days of violation being pointed out, the trial court permitted Exhibit 13 and Exhibit 14 to be offered *for all purposes* (R. Item II, p. 617—Appendix p. A-1), despite the fact that there is a question as to how many actual days of drilling took place and how many days the well was shut down "waiting on cement" to harden which is not drilling. The court, in addition, allowed evidence as to the limited number of producing days allowed by the State (R. Item II, p. 621).

The trial court in pronouncing judgment, after allowing this evidence, not considered by the jury, had this to say: (Copied from trial court's opinion shown in appendix).

> "Now, how this well was actually produced is not established by anything except that little bit of evidence you had about its being produced on a calendar basis

for some period of time—for four months, or something. (Item II, p. 618)

"I don't know what the Court is entitled to do about taking judicial knowledge, but I am sitting here knowing that they did not produce day after day after day after day for ten years, or 3,650 days. (R. Item II, p. 619).

"Now, with respect to the 3,650 days of 'operation', I believe that were it to be done again, that that could be done a shade more artfully, both by counsel for the State, and certainly by the Court. Since *we* have these findings, although maybe I might like to try it over to see if *we* could do it a little better—*we* have these findings which establishes the amount with respect to all of the defendants. (R. Item II, p. 622)

"This well certainly was unplugged for a period of at least 3,650 days; so on that basis I will enter a judgment for the plaintiffs in accordance with the dollars found with respect to each of the various defendants by the jury." (R. Item II, p. 623).

If this is "due process"—no pleading for a fine for an unplugged well; no proof as to days of either drilling or days of producing oil and the introduction of evidence not submitted to a jury on an unconstitutional statute not even requiring a showing of *scienter*, with a possible fine in this case of $3,667,000.00, then this Court should refuse this application. If the Court thinks otherwise, the matter should be investigated.

The Court of Civil Appeals, in its opinion (R. Item IV, p. 11), analyzed the evidence on days of production by stating:

"This evidence in our opinion established only the possibility that the well produced oil each of the 3,650 days for which penalties were assessed. It is no more than a scintilla."

The Petitioners, therefore, were denied a jury trial, were fined on a violation not complained of in the pleadings, and were assessed a penalty under an unconstitutional statute providing for excessive fines, and fined on a basis not within the pleadings. The question before the Court is, therefore, does this state court treatment violate "due process" and "equal protection" and the privileges and immunities the Bill of Rights of the Constitution of this great country intended to guarantee a fair trial to each citizen?

TIME AT WHICH FEDERAL QUESTION WAS RAISED

This cause was one of more than a hundred similar suits filed by the State of Texas for fines or penalties for alleged violations of a rule or order of the Texas administrative body in charge of oil and gas, the Railroad Commission of Texas, usually referred to as the so-called slant hole cases, which arose during the year 1962, followed by a great deal of publicity and finally the contested trial of this particular case, which has been the only one of such cases contested, and taken up through the Texas courts. The suit is based upon the provisions of Article 6036, Texas Revised Civil Statutes.

Paragraph 5 of Plaintiff's Original Petition (R. Item 1, p. 7) reads as follows:

> "The Plaintiff shows the court that the drilling of said deviated oil well, and the production of oil from the same, by the Defendants, as above alleged, were in disregard and violation of the laws of the State of Texas, and was in disregard and violation of the rules and order of the Railroad Commission of Texas, including the above mentioned rules, regulations and permits."

Plaintiff's First Amended Original Petition upon which the case was tried alleged the violations complained of in Paragraph 4(o) (R. Item 8, p. 50) to be: "By virtue of *drilling* said crooked oil well No. 1, and by virtue of *producing oil* by means of said crooked well * * * the Defendants were guilty of violating * * * the rules of the Railroad Commission of Texas." (This allegation is quoted in full in the opinion of the Court of Civil Appeals, Item IV, p. 9, and shown in the appendix hereto at page A-18).

The rules or orders of the administrative body alleged to have been violated were alleged to be either Statewide Rule 37, which is a spacing rule which nowhere mentions the deviation of wells, or Statewide Rule 54, which specifically defines deviated wells and requires a showing of "intent", or Hawkins Field Rule No. 1, which nowhere mentions the directional drilling of wells. (R. Item I, p. 50). No evidence of intent or *scienter* was offered and the State accordingly gave up its claims under Statewide Rule 54 (Opinion of Court of Civil Appeals, p. 7—Appendix p. A-15). The fine assessed was for violation of Statewide Rule 37, for 3650 days and 16 days. The total fine sought by the Respondent was against the Defendants, jointly and severally (R. Item I, p. 52). No proof was offered in the trial of the case as to *how many days were involved in the drilling* of the well and *how many days the well operated by producing oil.*

The Petitioners first raised their Federal question in Paragraph XIII of their Answer (R. Item I, p. 71) wherein they plead:

> "For further answer if same be necessary, these Defendants would show that Art. 6036 in providing for

> total maximum penalty of $3,667,000.00 is unconstitutional and void as being in contravention of Sec. 1 of Art. 14 of the amendments to the United States Constitution in that it permits and authorizes the deprivation of Defendants' property without due process of law and deprives these Defendants of their access to the courts, and that these Defendants plead in bar to this suit."

This plea was overruled by the trial court by order dated October 21, 1963 (R. Item I, p. 88), paragraph 8 of which order provided:

> "The plea in bar set out in paragraph 13 of the First Amended Original Answer of Defendants Harrington, Allgood and Lutes attacking the constitutionality of Art. 6036 under the United States Constitution is in all things overruled, to which action of the Court defendants duly excepted."

This same question of "due process" was raised in the Court of Civil Appeals as Point 26 and was by that Court overruled (R. Item IV, p. 34). The same point was raised by the Petitioners in their Application for Writ of Error as their 14th Point (R. Item VI, p. 59), and all Federal questions were overruled without even being discussed in the opinion of the Supreme Court of Texas, the same five Federal questions here presented were presented in Petitioners' Motion for Rehearing in the Supreme Court of Texas (R. Item XIII) and were by that Court specifically overruled in its final order (R. Item XV).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of the United States has, since early times, been the guardian of the rights of citizens of the United States against unreasonable statutes passed by State

legislatures and against injustices or denial of due process in state courts. Although most State Constitutions provide for certain protections for their State residents, there are very few state courts which are prone to hold that an act of the legislature of their State to be unconstitutional. It is for this reason that the Petitioners feel that this Court in its unprejudiced and unbiased position should examine the Texas statute in question and determine whether it violates the rights guaranteed to these four Texans as citizens of the United States. This Court's ruling is on a matter vital to a great many persons involved in close to one hundred suits that your ruling will determine.

This same statute has once before been reviewed by a Federal three judge court sitting in Austin in 1932, when that court used the hereinafter quoted language in its discussion of the severity and excessiveness of the fine which could be imposed thereunder. It is interesting to note that the quoted language was made by the court before the 1935 change in the statute which deleted the requirement that *scienter* be shown to establish a penalty. It is to be noticed in the opinion of the Texas Supreme Court now under examination that a showing of *scienter* is not required because of the change of the wording by the legislature in the year 1935. (See opinion in Appendix, p. A-76). We, therefore, today, have a much more drastic and excessive statute than the three judge Federal Court had before it in such case of *F. C. Henderson, Inc., v. Railroad Commission of Texas*, 56 F. 2d 218, where that Court held:

> "While we find the statutes valid, we are impressed with plaintiff's contention that the penalties provided

> by the several statutes (Articles 6008 and 6036) of $1,000 a day, each and every day to constitute a separate offense, are on their face so drastic, so excessive and extreme as that they appear plainly to be designed to affright those subject to the act into abject and incontinent submission. It is fundamental that there is no due process in a statute which, though it provides for penalties collectible by suit, makes every day a new offense, and thus piles them so heavily on as to make prohibitive the hazard of court trial. Such provisions in statutes preventing access to the courts to try out disputed questions of right, deprive the citizen of his fundamental right to 'know his rights, and knowing dare maintain them.' They may not be so pressed."

An appeal was begun from this ruling, but in view of the additional statement of this three judge Federal Court that:

> "The case will be kept open, however, for orders at the foot of the decree, and should it be made later to appear that the defenders (The State) are undertaking to enforce the law by claiming penalties in advance of the final determination of its validity, plaintiff may apply to this Court for an injunction of the kind granted in Oklahoma Operating Co. v. Love, supra, to protect it against the consequences of drastic and oppressive efforts of the State to compel a surrender of plaintiff's undoubted right to in good faith and upon reasonable grounds contend in the courts for the correctness of its view that the statutes as applied to it are confiscatory.";

the State of Texas saw fit to use some discretion in its contentions and the appeal to this Court begun was dismissed. 53 S. Ct. 4. This case, therefore, will be the first opportunity of this Court to pass upon whether this particular Texas Statute in its more extreme present form is such as to deny "due process".

Under the holding of the Supreme Court of the State of Texas, no showing of intent, knowledge, or *scienter* is necessary to be shown. (R. Item XII, p. 18—Appendix, p. A-76). The amount sought in this particular case was a fine of $3,667,000.00, jointly and severally, as against these four individuals for a claimed violation nowhere spelled out in the orders of the administrative body of Texas involved. It will be noticed that the penalty fine assessed was for the violation of Statewide Rule 37 which in no place mentions deviation of an oil well. The rule involving the deviation of an oil well is the Texas Statewide Rule 54, but this rule would require a showing of intent, knowledge or *scienter.*

Not only was a fine assessed under this Texas statute believed to be unconstitutional, but it was assessed under a procedure that did not allow these Petitioners "due process" or the "equal protection of the laws". The trial court assessed and the Supreme Court of Texas approved a fine imposed without pleadings to support it, without proof to support it, and without affording these parties a jury trial, in the midst of mass adverse publicity which was sufficient to even displace the adverse publicity afforded the Billy Sol Estes' scandal which arose at the same time and which this Court has heretofore so wisely recognized, and has protected that harassed individual.

Unless this Court sees fit to review the matter, there are still almost a hundred of these same penalty suits yet to be determined in the Texas courts where the only proof to be required under the Texas Supreme Court ruling is a showing of "deviation" of a well and fine could then be imposed

without a showing of participation, without a showing of knowledge or *scienter* of any kind, and the amount which could be assessed and the amounts which are now sought in one case exceed $13 million dollars. Is this excessive? Is this "due process"?

CONCLUSION AND PRAYER

For the benefit not only of these Petitioners, but for the benefit of multiple groups of citizens to be affected, not only in the present pending persecution but in persecutions that could arise in the future, this Court has before it a very vital and material and new issue to be decided and only this Court can afford the protection in this type of case that our forefathers intended each citizen of the United States to have.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari be issued to the Supreme Court of the State of Texas to the end that this cause and the unconstitutional statute involved in the flagrant violation of "due process" and "equal protection" approved by the Supreme Court of the State of Texas may be corrected and justice thus prevail.

Copies of the foregoing Petition for Writ of Certiorari have been furnished to the Honorable Crawford Martin, the new and present Attorney General of the State of Texas, now representing the Respondent.

H. M. HARRINGTON, JR.,
324 Bramlette Building,
Longview, Texas,
Attorney for Petitioners.

APPENDIX

OPINION OF THE TRIAL COURT

(Record, Item II, p. 617/623—attorneys remarks omitted and underscoring that of Petitioners)

THE COURT: "Well, gentlemen, I believe that with reference to the drilling business there is not any real controversy on the period of time between the beginning and the completion. Therefore, I am going to allow the evidence which has been tendered on that proposition, which I think shows without any controversy, or at least it is going to be the conclusion of the Court that it shows without controversy, that the well was in the process of being drilled between April 6th and April 21, inclusive, which is sixteen days according to my count, and which is the issue which was submitted to the jury; so I am going to admit after verdict the evidence tendered on that issue.

Now, on this production, I think Mr. Baton's additional evidence which is tendered was tendered by him primarily for the purpose of showing that legally the number of days which the Court submitted the well could not have produced that number of days, which was 3,650; but *I have serious doubt in my mind from what little I have been able to pick up in the course of the trial and since we have been arguing these motions, with what Mr. Baton has offered, and with what the State has tendered, that it can be said that the well has produced any number of days.* Now, that is where I have difficulty in following you gentlemen on the question of production. It is true that the order says that it might be produced—that it is legal to produce such and so, or it is legal to produce it in some other way. *Now, how this well*

was actually produced is not established by anything except that little bit of evidence you had about it being produced on a calendar basis for some period of time—for four months, or something. I am not sure that I understand what producing on a calendar basis means. Now, you contend that means that they produced eight days production over 30 or 31 days, depending on how many days are in the month.

I think the order pretty well spells out what they can do, but there are several options available to them under that order as to what they can do.

I don't know what the Court is entitled to do about taking judicial knowledge, but *I am sitting here knowing that they did not produce day after day after day after day for ten years, or 3,650 days.*

Whether it's produced on an eight-day basis, or a calendar day basis, or what not, the well was unplugged for a period of ten years, I think the record is undisputed on that; so that has nothing to do with what we are talking about so far. All I am saying is that *I am pretty strongly of the opinion here that even with the evidence that has been tendered that I believe the Court cannot say as a matter of law that this well has been produced 3,650 days.*

I am going to admit—I don't know what it establishes, but I am going to admit as a non-controversial matter the proration schedule tendered by the Defendant Baton and the order with respect thereto tendered by the Plaintiff State of Texas. Now, as to whether they prove what maybe the plaintiff or the defendant Baton think they prove, that is

something else again. I am going to admit those two things because I believe those two pieces of evidence are not disputed. That takes care of the motions, and that gets back to the judgment that we are going to enter here.

Now, therefore, I will enter judgment on that portion of the jury's verdict with respect to the sixteen days of drilling. Now, with respect to the 3,650 days of "operation", I believe that were it to be done again, that that could be done a shade more artfully, *both by counsel for the State, and certainly by the Court.* Since *we* have these findings, although maybe I might like to try it over to see if *we* could do it a little better—*we* have these findings which establishes the amount with respect to all of the defendants, and I do believe that Rule 37—a portion of it to which counsel referred—I believe it is still in effect, and was in effect at all times in the Hawkins Field rules. Rule 37 does say that a well not drilled in accordance with a Rule 37 permit shall be plugged. Now, Mr. Wellborn argues that that portion of Rule 37 means surface locations, and that Rule 54 deals specifically with subsurface deviations and that it should prevail, and that Rule 37 is not in this case. However, *I believe that a well that is drilled under Rule 37 permit, which is bottomed on an adjacent lease as found by the jury here, is in violation of the Rule 37 permit; and, therefore, under the Rule 37 is required to be plugged; and this well certainly was unplugged for a period of at least 3,650 days; so on that basis I will enter a judgment for the plaintiffs in accordance with the dollars found with respect to each of the various defendants by the jury.*"

JUDGMENT OF THE TRIAL COURT

(Record, Item I, p. 213)

No. 130,846

THE STATE OF TEXAS
v.

HARRY M. HARRINGTON, JR., et al

In the District Court, 53rd Judicial District,
Travis County, Texas

Judgment

On the 21st day of October, 1963, came on for trial the above entitled and numbered cause in which the State of Texas is Plaintiff and Harry M. Harrington, Jr., Reid H. Allgood, Charles W. Lutes, J. W. Baton and Douglas Godfrey are Defendants; and the State of Texas appeared by and through the Attorney General of Texas, and Harry M. Harrington, Jr., appeared in person, and Reid H. Allgood, Charles W. Lutes, J. W. Baton and Douglas Godfrey appeared by their respective attorneys of record; and, after the Court had heard and considered all of the pre-trial proceedings and preliminary motions, including special exceptions and motions for continuance, presented by the different parties, and after the Court had acted upon the same as shown by the orders on file herein, the Court proceeded with the trial of the case; and a jury of twelve good and lawful men and women were duly selected, empanelled and sworn as prescribed by law, and the jury heard and considered the plead-

ings, the evidence and the argument of counsel; and the court instructed the jury on the law and submitted to the jury special issues, and the jury retired and elected George H. Fulford as its foreman and considered said special issues, and on October 30, 1963, answered and returned the same into open court, and the Court received and accepted the same, as shown by said verdict and answers on file herein; and the jury was then discharged; and thereafter the State of Texas filed its "Motion for Admission of Additional Evidence", and Harry M. Harrington, Jr., Charles W. Lutes and Reid H. Allgood filed in reply to the same their "contest" of said motion, and thereafter J. W. Baton filed his "Motion for Permission to Introduce Additional Evidence", and Harry M. Harrington, Jr., Charles W. Lutes and Reid H. Allgood filed in reply to the same their "contest" of said motion, and the State of Texas filed in reply "Plaintiff's Answer to J. W. Baton's 'Motion'", and the Court heard and considered each of said motions, contests, answers and replies, and granted each of said motions and granted the parties the right to introduce the additional evidence as stated in said motions and in the "Plaintiff's Answer to J. W. Baton's 'Motion'", to which rulings and holdings the Defendants each in open court excepted, and said evidence was offered and tendered by the respective parties, and was admitted by the court, and is hereby made a part of the evidence in this case, to which the Defendants each in open court objected and excepted and now object and except, and the Court also overruled the "Motion for Judgment Non Obstante Veredicto" and "Alternative Motion for Judgment" filed by Harry M. Harrington, Jr., Reid H. Allgood and Charles W.

Lutes, and overruled the "Motion for Judgment that Plaintiff take Nothing" and "Alternative Motion for Judgment" filed by J. W. Baton, and overruled all other motions filed by the parties hereto, to all of which action the Defendants each and all in open court excepted; and the Court considered the evidence that was introduced prior to the case being submitted to the jury and the evidence introduced on said motions after the verdict of the jury, and the Court finds from the evidence, and in accordance with the findings of the jury, that judgment should be entered in favor of the State of Texas and against Harry M. Harrington, Jr., Reid H. Allgood, Charles W. Lutes and J. W. Baton for penalties, under the provisions of Article 6036 V.A.C.S., for acts committed in violation of the laws of the State of Texas and the rules, regulations, and orders of the Railroad Commission of Texas, and that Douglas Godfrey should be discharged, as hereinafter provided.

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court, that the State of Texas do have and recover of and from Harry M. Harrington, Jr., the sum of $117,416.72 with interest thereon from the date of judgment until paid at the rate of 6% per annum, that the State of Texas do have and recover of and from Reid H. Allgood the sum of $60,841.72 with interest thereon from the date of judgment until paid at the rate of 6% per annum, that the State do have and recover of and from Charles W. Lutes the sum of $117,416.72 with interest thereon from the date of judgment until paid at the rate of 6% per annum, and that the State of Texas do have and recover of and from

J. W. Baton the sum of $9,125.00 with interest thereon from the date of judgment until paid at the rate of 6% per annum; and that said sums shall be payable to the Treasurer of the State of Texas for the benefit of the General Revenue Fund of the State of Texas; and

It is also ORDERED, ADJUDGED AND DECREED that all court costs are hereby taxed against the said Harry M. Harrington, Jr., Reid H. Allgood, Charles W. Lutes and J. W. Baton, jointly and severally; and

It is also ORDERED, ADJUDGED AND DECREED that execution shall issue in the name of the State of Texas for the collection of the judgment herein provided and for all court costs incurred in this case; and

It is further ORDERED, ADJUDGED AND DECREED that the State of Texas take nothing against Douglas Godfrey, and that he be discharged with his costs.

SIGNED AND ENTERED this 3rd day of January, 1964.

/s/ HERMAN JONES

Judge

Opinion of the
COURT OF CIVIL APPEALS OF TEXAS
(Record, Item IV—officially reported in 385 S.W. 2d 411)

IN THE COURT OF CIVIL APPEALS, THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

No. 11,234

HARRY M. HARRINGTON, JR., et al.,

Appellants,

v.

THE STATE OF TEXAS,

Appellee.

From the District Court of Travis County, 53rd Judicial District, No. 130,846, Honorable Herman Jones, Judge.

The State of Texas sued H. M. Harrington, Jr., Charles W. Lutes, Reid H. Allgood, John W. Baton, appellants, and Douglas Godfrey, individually and as members of HAL COMPANY, a partnership, for penalties as authorized by Art. 6036, V.T.C.S.[1] for the violation of certain statutes and rules and regulations of the Railroad Commission.

[1] "Art. 6036. Penalty

"In addition to being subject to any forfeiture that may be provided for by law and to any penalty that may be imposed by the Commission for contempt for the violation of its rules, regulations, or orders, any person violating any of the provisions of this Act or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or violating any rule, regulation, or order of the Com-

(Footnote continued on following page)

Following a trial by jury, judgments in varying amounts were rendered against all defendants except Douglas Godfrey as to whom a take nothing judgment was rendered.

Appellants' first point is that the trial court erred in denying them the right to require the State of Texas to answer interrogatories pursuant to the provisions of Rule 168, T.R.C.P. This rule provides, in part:

> "At any time after the party has made appearance in the cause, or time therefor has elapsed, any other party may serve upon such party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them or by the attorney for the party, . . .
>
> Interrogatories may relate to any matters which can be inquired into under Rule 186a, but the answers,

(Footnote continued from preceding page)
mission promulgated thereunder, shall be subject to a penalty of not more than One Thousand Dollars ($1000) for each and every day of such violation, and for each and every act of such violation, to be recovered in any Court of competent jurisdiction in Travis County, or in the county of the residence of the defendant or, if there be more than one defendant, in the county of the residence of any of them, or in the county in which the violation is alleged to have occurred, such suit by direction of the Commission to be instituted and conducted in the name of the State of Texas by the Attorney General or by the county or district attorney where such suit is brought. The recovery or payment of any such penalty shall not authorize the violation of any provision of this Act, or Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation, or order of the Commission promulgated thereunder.

"Any person aiding or abetting any other person in the violation of this Act, or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation, or order of the Commission promulgated thereunder, shall be subject to the same penalties as are prescribed herein for violation thereof by any such other person."

subject to any objections as to admissibility, may be used only against the party answering the interrogatories."

It is our opinion that this rule is not applicable to the State of Texas. We know of no State official or agent who is authorized to answer interrogatories for the State. It is the duty of the Attorney General, under Art. 6036, to institute and conduct this suit, but he is prohibited by Art. 4411, V.T.C.S., from making any admission, agreement or waiver in a suit to which the State is a party which shall prejudice the rights of the State. The powers of the Attorney General, thus circumscribed, are not to be enlarged by the courts. State v. Reagan County Purchasing Co., 186 S.W. 2d 128, El Paso Civ. App., writ ref., w.o.m.

Appellants cite authorities to the effect that Federal Rule 33 of similar import to Rule 168 has been held applicable to the National Government. Without attempting to analyze the powers of the Attorney General of the United States, we note that he has broad powers of compromising claims against the United States. Title 28, Sec. 2414, U.S.C.A. The Texas Attorney General has no comparable authority. Unless the Attorney General is authorized to answer interrogatories for the State we know of no other officer who is so authorized and appellants do not suggest any. It would be futile for the Attorney General to answer interrogatories for the State when his answers could not prejudice the rights of the State. Point One is overruled.

Point Two is that the trial court erred in permitting the State to file a "trial amendment" an hour before trial time

and in denying their motion for continuance based on their resultant surprise.

That portion of the amended pleading[2] to which appellants objected by filing a motion to strike was the allegation that, "The Defendants violated Railroad Commission Statewide Rule 37, and also Hawkins Field Rule 1," whereas the previous pleading alleged that, "The Defendants violated Railroad Commission Statewide Rule 37, and also East Texas Field Rule 1, . . ."

We quote from appellants' argument under this point:

> "The significance of this late change in pleading is readily apparent. The well in question is located in the Hawkins Field and is not located in the East Texas Field. The Defendants obviously, therefore, had not and could not have violated any East Texas Field Rule, because such Field Rules are not and could not be applicable to a well in the Hawkins Field. The Defendants had come prepared to defend the case based on the Plaintiff's case as it was then pleaded, and were forced without time for preparation into a case predicated on an entirely different cause of action. Strict pleading is required in civil penalty suits."

The only significant difference between East Texas Rule 1 and Hawkins Field Rule 1, besides spacing variation, is the provision in the East Texas Rule that wells drilled in violation of a permit issued under it "shall be plugged," whereas the Hawkins Field Rule 1 does not contain this provision.

Statewide Rule 37 with the violation of which appellants were charged in all prior pleadings contains the provision

[2] This amendment was filed before trial. It was not a "trial amendment." Rule 66, T. R. C. P. It was not a complete pleading. It was not an amended petition. Rules 62-65, T. R. C. P.

that a well drilled in violation of a permit granted under it "shall be plugged."

Under these circumstances, we find no element of justifiable surprise by appellants which was occasioned by the late filed amended pleading. They certainly were not surprised when informed that their well was in the Hawkins Field and not in the East Texas field. They were at all times charged with violation of a Commission Rule which required the plugging of the well. The Hawkins Field Rule, on its face, is less onerous than the East Texas Field Rule, because it does not expressly require the plugging of a well drilled in violation of a permit issued under it.

It is our opinion that the trial court did not err in refusing appellants' motion for a continuance. There was error in the trial court's action in permitting an incomplete pleading to be filed as an amended petition. This error, in our opinion, was harmless under Rule 434, T.R.C.P. Point Two is overruled.

Points Three and Four, jointly briefed, are that the court erred in holding that Rule 37 of the Commission applies to a well in the Hawkins Field which is subject to Hawkins Field Rule 1, and that the court erred in holding that Rule 37 applied to a deviated well rather than Rule 54.

It is our opinion that the court did not err in holding that Rule 37 is of statewide application except as modified by special rules for individual fields such as the Hawkins Field.

Statewide Rule 37 is a spacing rule with several provisions. Section (a) provides spacing distances, application and hear-

ing on exceptions. Section (b) provides for a hearing on exceptions duplicating parts of Section (a). Section (c) provides for the filing of a plat. Sections (d), (e) and (f) read as follows, to-wit:

> "Section (d). In the interest of protecting life and for the purpose of preventing waste and preventing the confiscation of property, the Commission reserves the right in particular oil and gas fields to enter special orders increasing or decreasing the minimum distances provided by this rule.
>
> Section (e). No well drilled in violation of this rule without special permit obtained, issued or granted in the manner prescribed in said rule, and no well drilled under such special permit or on the Commission's own order which does not conform in all respects to the terms of such permit shall be permitted to produce either oil or gas, and any such well so drilled in violation of said rule, or on the Commission's own order shall be plugged.
>
> Section (f). This rule shall in no wise rescind, abrogate or modify the provisions of special orders applicable to the spacing of wells in particular fields requiring minimum spacing distances either greater or smaller than provided herein."

The Hawkins Field Rule 1 contains this provision:

> "THEREFORE, IT IS ORDERED By the Railroad Commission of Texas that the following rules and regulation be and the same are hereby adopted effective this date to be maintained in effect, in addition to the general conservation rules and regulations governing said field, for this field or extensions thereof until further ordered by the commission:"

This rule contains spacing regulations differing from those contained in Rule 37. It provides that the general order of the Commission as to subdivision of property shall apply,

an order which is not a part of Rule 37. The Hawkins Field Rule contains numerous technical provisions. It does not contain a provision that a well drilled in violation of a permit issued under it shall be plugged.

When Section (f) of Rule 37 and the copied portion of the Hawkins Rule 1 are considered, it is evident that the two rules are to be read and construed together, and that the special field rules have priority over Rule 37 only to the extent of conflicting provisions.

It is a general rule of statutory construction that statutes in pari materia should be read and construed together as though they were parts of one and the same law. 53 Tex. Jur. 2d, Statutes, Sec. 186. This rule of statutory construction is applicable to rules of the Commission which have the force of statutes.

The plain express intent of the Commission is to prohibit the production of oil or gas from a well drilled in violation of its rules. We cannot ascribe to the Commission an intent, derived from its failure to include a plugging clause in Hawkins Rule 1, to discriminate in favor of illegal wells in the Hawkins Field and to allow them to produce and go unplugged. In our opinion, there was no need to incorporate a plugging clause in Hawkins Rule 1 for the reason that it was in Rule 37, a rule of Statewide application and expressly brought forward in the Hawkins Rule 1. There being no conflict between the plugging requirement of Rule 37 and any provision of Hawkins Rule 1, we hold that Rule 37, in such respect, is fully operative in the Hawkins Field.

Rule 54 of the Commission reads:

> "(a) The term 'directionally deviate' as used in this order shall mean the deviation of a bore hole from the vertical or from its normal course in an intended predetermined direction or course with respect to the points of the compass and shall not include deviations made for the purpose of:
>
> (1) Straightening a hole which has become crooked in a normal course of drilling.
>
> (2) Deviating a hole at random 'without regard to compass direction' in an attempt to sidetrack a portion of the hole on account of mechanical difficulty in drilling.
>
> (b) Nothing in these rules shall be construed to permit the drilling of any well in such manner that it crosses property lines, except in cases where special permission has been granted by the Commission as the result of a hearing on such matter."

Appellants contend that Rule 37 deals only with surface locations of wells and not with deviation in drilling or the location of the bottom hole, but that these matters are controlled and regulated solely by Rule 54 which requires an intent to deviate in order to constitute a violation of the rule.

A violation of Rule 54 was pleaded by the State, however, as we understand the State, it does not contend that a violation of Sec. (a) has been established because there is no finding of intent. The State does assert that a violation of Sec. (b) of Rule 54 has been established by reason of the jury finding that appellants' well was not bottomed under their lease.

We cannot agree with appellants that Rule 37 applies only to surface location of wells.

A note in 42 Tex. Law Rev., p. 922 by Mr. Thomas L. Healey in reviewing Harrington v. Railroad Comm., 375 S.W. 2d 892 (Tex.), gives the common sense answer to appellants wherein it is stated," . . . the only reason for the surface location is to specify the bottom hole location."

Appellants cite the testimony of Mr. Joseph Trimble given in a case then pending in our Supreme Court when Mr. Trimble was representing the Commission to the effect that the Commission considered a Rule 37 Permit to relate to the surface location of the well and, prior to the adoption of Rule 54, that "the Commission is not concerned where the well is bottomed if you don't cross a lease line."

The testimony referred to is not in evidence in this case and we have no authority to consider it. Also, the Commission herein repudiates such testimony of Mr. Trimble.

Appellants also refer to the opinion in Harrington, supra, as holding ". . . by inference that Rule 37 covers the surface location only . . ." Appellants do not analyze this case and point out the basis for their statement. We have carefully read this case and the only language which we find which might be susceptible to appellants' construction of the opinion is the statement, "Drilling at an established surface location may be a condition to the right to drill, but drilling a straight hole obviously is not." This statement has reference to the Court's discussion of Rule 54 which the Court states ". . . expressly recognizes the right of an operator to correct an excessive deviation. . . ." This, to us, simply means that drilling at the wrong surface location is prohibited ab initio and can never be corrected, whereas crooked

drilling can only be corrected after it is committed. The logic of this is unanswerable. It is our opinion that Harrington does not hold by inference, or otherwise, that Rule 37 does not embrace within its terms a whole well when it refers, repeatedly, to a "well." A surface location is a mere point on the landscape. A "well" must have dimensions. It must have a top and a bottom. Rule 37 regulates the spacing and drilling of "wells." The Commission does not regulate the use of the surface except as incidental to its primary function in regulating the production of oil and gas which is usually found below the surface and at the bottom of the well.[3] Points Three and Four are overruled.

Point Five is that the Court erred in rendering judgment for 3,650 days for violation of Rule 37 on the Court's finding that appellants' well had not been plugged because the pleadings do not seek a penalty for failure to plug.

The pleadings of the State do not specifically allege that appellants failed to plug the well. They do allege, and we quote:

> "This suit is being brought for civil penalties because of violations by the Defendants of the laws of the State of Texas, towit, the provisions of House Bill 782, Acts of 1935, 44th Legislature, p. 180, Ch. 76, and of Title 102, Revised Civil Statutes of Texas, 1925, as amended, and particularly Article 6036, V.A.C.S., thereof, and of the rules, regulations and orders of the Railroad Commission of Texas, and other penalties, as provided by

[3] In Stewart v. Humble Oil & Refining Company, 377 S. W. 2d 830, Tex. Sup., a Rule 37 case, Humble et al "Concede that the Commission had the authority to approve the *subsurface* locations of Stewart's wells."

the laws of the State of Texas, and as hereinafter alleged. . . .

By virtue of drilling said crooked oil Well No. 1, and by virtue of producing oil by means of said crooked well which resulted in oil being wrongfully taken from other people, and by virtue of filing a false log and well record, all as above alleged, the Defendants were guilty of violating the laws of the State of Texas and the rules of the Railroad Commission of Texas, thereby being liable for the penalties prescribed by law, and hereinafter stated, said violations being as follows:

1. The Defendants violated Railroad Commission State Wide Rule 37, and also Hawkins Field Rule 1 (effective July 13, 1939), each of which provide that as to oil wells drilled as close to property lines as this well was drilled such well shall be drilled only at the location authorized by the permit of the Railroad Commission for that particular well; and in this case the Defendants were authorized to drill said well 234 feet north of the south property line and 234 feet east of the west property line, but the Defendants directionally drilled it closer to the west property line, and actually slanted it across the lease line and into the lands of others; and the Defendants illegally operated said well for a period of over 3,650 days.

2. The Defendants violated Railroad Commission State Wide Rule 54 (being order No. 20-14, 181, effective April 1, 1949), which then provided that no well should be directionally deviated in an intended predetermined direction from its vertical or from its normal course before the operator shall have secured from the Commission a permit for such directional deviation; and in this case the Defendants directionally deviated said well in violation of said rule, and slanted the same into the lands of others, without a permit from the Commission to deviate the well."

It is undisputed that the well in suit was operated and produced oil monthly for the ten year period on which the assessed penalties were based.

It is our opinion that the pleadings, in this respect, were factually sufficient to allege the maintenance of the well in an unplugged state for the ten year period. A plugged well cannot operate. Neither can a plugged well produce oil. It was alleged that the well was operated and produced oil for ten years. A further allegation that the well was unplugged during that period would not have added any fact not pleaded by necessary implication.

Rule 45 T.R.C.P. requires all pleadings to be construed so as to do substantial justice. Our construction of the State's pleadings accords with that Rule. Point Five is overruled.[4]

Points Six and Seven, jointly briefed, are that the Court erred in rendering judgment based on the operation of the well for 3,650 days because there is no proof to such effect (Point Six), and, similarly, the Court erred in rendering judgment based on a finding that the well was drilled sixteen days because there was no proof to such effect.

As to the sixteen days drilling, a report filed with the Railroad Commission by J. W. Baton for the HAL COMPANY and sworn to before H. M. Harrington, Jr., Notary Public in Gregg County, states that the well drilling commenced April 6, 1952, and was completed April 21, 1952. This completion date is supported by another report filed

[4] In view of our reversal as to this phase of the case, this question should not recur.

with the Commission by Mr. Baton for the HAL COMPANY, which is witnessed by appellant Charles W. Lutes.

There is other evidence in the record to sustain a finding that 16 days were spent in drilling this well, but we consider the evidence stated is sufficient to demonstrate that there was some evidence to sustain it.

The evidence relied on to support the finding that the well was operated 3,650 days consists of reports made to the Commission by or on behalf of appellants regarding production from the well. They show that the well produced its monthly allowable commencing with May, 1952, to and including June, 1962. During this period the well produced 284,133 barrels of oil.

Mr. Roy D. Payne, Director of field operations for the Commission, testified as follows:

> "Q. Now, then, Mr. Payne, isn't it true that the Hawkins Field is subject to what we know as shut-down days in the State of Texas under its oil and gas regulations?
>
> "A. Yes, sir.
>
> "Q. So that if you have an eight-day schedule for a month, that means that a well may produce on eight out of the thirty or thirty-one days of the month; is that correct?
>
> "A. It can produce an allowable for eight days. It can produce the allowable over the entire period of the month on a calendar day basis.
>
> "Q. In other words, a well that—let's take this Number 4 Well,—or let's take the Number 9 Well; that is the first one we discussed. Number 9 Well, that will pump seventy-five barrels a day as of the last of

June of '62; you will allow it to make its 187 barrels a day by pumping more than eight days?

"A. Yes, sir.

"Q. That is Commission policy, is it?

"A. Yes, sir. . . .

"Q. Now, would you explain once again what it means to have an allowable that—suppose a well were on an eight-day allowable; does that mean it can produce thirty days a month as long as it only produces eight day's production?

"A. Yes, sir.

"Q. So that you could take a small amount of oil each day and produce the eight-day allowable?

"A. Yes, sir.

"Q. It doesn't mean it just produces eight days and then it doesn't produce on the others?

"A. No, sir."

This evidence, in our opinion, establishes only the possibility that the well produced oil each of the 3,650 days for which penalties were assessed. It is no more than a scintilla. We believe, if necessary, that we would take notice, as a matter of common knowledge, that oil wells, other than marginal wells, do not as a rule produce oil every day in the month to make the allowed monthly production.

The State suggests that since the evidence shows that the well was in an operative condition that this is the equivalent of a showing that it was continuously operated by the production of oil.

The State also suggests it having shown that the well was completed as a producer, the presumption should be

indulged that production was continuous thereafter until otherwise shown; also, that this information being peculiarly within the knowledge of appellants that the burden was on them to show the days the well actually produced.

The appellants in this case, other than Baton, answered to the merits by general denial only, except that they, not including Baton, specially denied existence of the alleged partnership. Other than the denial of the partnership, we are not informed of any defense which appellants were required specially to plead. The Statute, Art. 6036, contains no exceptions which, conceivably, could put the burden of pleading and proof on appellants.

Without answering, seriatim, these suggestions by the State, we hold that the rules advocated are not applicable in this suit for penalties where the law requires strictness in pleading and proof. 43 Tex. Jur., Sec. 720, p. 697, Penalties, Sec. 15, p. 15, 45 Tex. Jur. 2d.

Inferences and intendments will not be employed to aid a pleading in a penalty suit. Penalties, 45 Tex. Jur. 2d, Sec. 14, p. 13. By the same token, we do not believe that the presumptions sought to be invoked here are available to the State. Penalty suits are analogous to criminal proceedings and the State, in our opinion, should shoulder the burden of establishing its case unaided by presumptions applicable in ordinary civil actions. See Lee v. Robinson, 282 S.W. 2d 397, Texarkana Civ. App., writ dism., where it is held that neither the capacity of a well to produce oil or that its allowable had been set by the Commission raises a presumption that it produced oil.

There is also in the State's brief the statement that, "There was no evidence introduced upon which a jury finding could rest that the well failed to produce on any given day or for any number of days. Consequently, there was no fact issue to go to the jury on the number of days of actual production."

This, in our opinion, is a misconception of the law. The burden was on the State to prove the number of days the well produced if it intended to base a judgment on the number of producing days. Appellants had no burden to prove the number of non-producing days.

As we understand the record, it conclusively establishes the minimum number of days the well produced oil over the ten year period. The record shows the daily potential of the well and its monthly production. By dividing this daily potential into the total production for the month, the minimum number of days the well operated is mathematically ascertained. We sustain appellants' Point Six.

Points Eight and Nine, jointly briefed, are that the Court erred in admitting in evidence reports and exhibits based on a gyroscopic survey of the well in suit over objections that the instrument employed to make such survey had not been proved reliable as the law requires.

All parties cite as correct and applicable the rule stated in Wigmore, The Science of Judicial Proof, p. 450, as quoted in Wilson v. State, 328 S.W. 2d 311, Texas Ct. of Cr. Appeals, as follows:

> "'. . . since the additions made possible to our unaided senses are due to the use of instruments constructed on knowledge of scientific laws, it is plain that

the correctness of the data thus obtainable must depend upon the correctness of the intrument in construction and the ability of the technical witness to use it. Hence, the following three fundamental propositions apply to testimony based on the use of all such instruments:

'A. The type of apparatus purporting to be constructed on scientific principles must be accepted as dependable for the proposed purpose by the profession concerned in that branch of science or its related art. This can be evidenced by qualified expert testimony; or, if notorious, it will be judicially noticed by the judge without evidence.

'B. The particular apparatus used by the witness must be one constructed according to an accepted type and must be in good condition for accurate work. This may be evidenced by a qualified expert.

'C. The witness using the apparatus as the source of his testimony must be one qualified for its use by training and experience.' "

The instrument used to survey appellants' well is known as a Sperry-Sun gyroscopic directional survey instrument. The witness who testified regarding this instrument was Mr. H. Grady Bell, an employe of Sperry-Sun Well Surveying Company. He was a mechanical engineer with five years of college education in Arlington State College and A&M University. He had worked for this company about ten years. He had made over five hundred well surveys, but not all with this instrument. Mr. Bell explained in great detail the operation of this instrument and the manner in which a well is surveyed. Mr. Bell testified that the instruments used in this survey were of a type accepted by engineers as dependable for the purpose of determining the inclination and direction in which the well hole travels under the surface.

Mr. Thomas H. Sellers, a senior bore hole surveyor with Sperry-Sun Well Surveying Company, with four years college education, East Texas Baptist College one year, three years at Texas A&M, who majored in electrical engineering, made the survey of appellants' well. He testified at length about the manner of making the survey and unequivocally stated that the instruments used by him were in proper order and functioned properly during the survey. The qualifications of Mr. Sellers were verified by Mr. Bell to whom we have previously referred.

The above testimony fully complies with the requisites stated in Wigmore, supra, for the admissibility of evidence obtained by the use of scientific instruments.

Appellants offered testimony to some mistakes which had been made in using the surveying instrument in question. These mistakes were quickly detected and corrected. They also cross-examined Mr. Bell regarding the length of time this surveying instrument had been in commercial use and Mr. Bell testified that it had been so used since June or July of 1962. The survey here was made in the latter part of July 1962. Mr. Bell further testified that the instrument used on this well was a "compact model of the gyro that has been used to survey wells since 1929." The instrument used appears to be an improved type of former models.

The question of whether a proper predicate was laid for the admission of the results for this scientific survey was at least issuable. The ruling of the trial court must be sustained unless there appears to have been an abuse of dis-

cretion on his part. We find no such abuse. Points Eight and Nine are overruled.

Point Ten by appellants other than Baton is that the trial court erred in permitting the State to reopen the case after the jury returned its verdict and offer evidence as to the number of days on which this well was drilled and as to the number of days it produced oil, it being asserted that these matters were controversial.

Rule 270, T.R.C.P., authorizes the introduction of additional evidence at any time except that evidence on a controversial matter may not be received after the jury verdict.

All that the trial court permitted to be introduced after the verdict as regards the number of drilling days was an admission made by Mr. Harrington in deposition proceedings and the admission in evidence for all purposes certain exhibits which had been admitted for limited purposes. These exhibits are discussed under Point Five, supra. The admission of Mr. Harrington is consistent with these exhibits as to the time spent in drilling this well.

No issue was submitted to the jury inquiring as to the number of days on which this well was drilled. There was no evidence on the issue. The evidence admitted after the verdict did not create a controversial issue. It was undisputed and conclusive.

We understand Rule 270 to refer to a controversial matter which has been or should be submitted to the jury. As to such matters additional evidence may not be received after the verdict. Such rule, however, does not, in our opinion,

preclude the reception in evidence after verdict of matters about which there is and could be no controversy. The evidence as to drilling was not controverted nor was there any showing that it could be controverted. We hold that it was properly received after the verdict. Texas Employers' Ins. Association v. Elder, 155 Tex. 27,282 S.W. 2d 371.

In our ruling under Point Six we have held that the number of days on which this well produced oil or was operated has not been adequately established. The error complained of here as to the admissibility of evidence after the verdict on this subject is, if committed, harmless. Point Ten is overruled.

Point Eleven is that the trial court erred in not submitting separate issues regarding the culpability of each appellant as a person violating specified statutes and rules and orders of the Commission.

By its charge, the trial court inquired whether appellants' well was bottomed off its lease and, conditioned upon an affirmative finding to this issue, what penalty should be assessed for drilling and operating the well, with separate findings for each appellant.

While Art. 6036 states that any person aiding or abetting any other person in violation of such Act shall be subject to the same penalties as are prescribed for its violation by such other person there were no allegations in the State's petition that any appellant aided or abetted any person in the violation of the Act. All appellants were charged as principals.

Appellants seem to argue when they say, "Since the State's petition failed to charge who was claimed to be the principal

and who was claimed to be the aider or abetter, the pleading was insufficient and requires this case to be reversed and rendered," that the Act requires that there be a person aiding and abetting another person in violating the Act before such other person can be charged with his own violation of it. Assuming, that this argument is germane to this point, we consider it to be completely untenable. The statute is not subject to this weird construction. Under it, there may or not be aiders or abettors. Point Eleven is overruled.

The Twelfth Point is that the trial court erred in refusing to enter judgment for appellants because there was no evidence that appellants knowingly, intentionally or wilfully deviated the well in controversy.

This is, perhaps, the most vital question to be determined in this case. If scienter on the part of appellants is required in order to penalize them for drilling on oil well bottomed on their neighbor's land, then this case must be reversed in its entirety.

It is not without some difficulty that we have concluded that it was not incumbent upon the State to allege or prove that the well was knowingly deviated or drilled to bottom off the lease of appellants.

Our difficulty has been primarily due to expressions of the Courts in Hedgepeth v. Hamilton Warehouse Co., 104 Tex. 496, 140 S.W. 1084 and Whitfield v. Terrell Compress Co., 62 S.W. 116, writ ref. and to the provisions of Rule 54 of the Commission.

In Whitfield it is "said"[5] that "The Act under consideration is highly penal in its character and it is only for a willful disregard of the law that its penalties should be inflicted." This statement is copied, apparently with approval, in Hedgepeth. A cursory reading of these cases will convince the reader that such statement was not necessary to the decisions and that no holding to such effect was made in either case.

An examination of the legislative history of Article 6036 establishes to our satisfaction that the Legislature has deliberately negatived the requirement that knowledge on the part of the violator is essential to the infliction of penalties provided by it. The history of this article is set out in the notes to it in Vernon's Annotated Texas Civil Statutes and will not be detailed here. It is sufficient to state that prior to 1934 the predecessor of this article did not provide that knowledge or wilfullness was required in order to be subject to the penalties prescribed. In 1934 the statute was amended so as to require that one must "knowingly and wilfully" violate its terms or "knowingly and wilfully" violate the terms of Commission rules, regulations or orders. The statute was last amended in 1935, and does not, by its terms, require that the violation be knowingly or wilfully committed in order that penalties be assessed.

"It will be presumed that the Legislature, in adopting the amendment, intended to make some change in the existing law, and therefore the Courts will endeavor to give some effect to the amendment." American Surety Co. of N.Y. v.

[5] See Penalties, 45 Tex. Jur. 2d, p. 5 where this word is used in referring to the pertinent language in such cases.

Axtell Co., 120 Tex. 166, 36 S.W. 2d 715, quoting from earlier Texas cases.

The only effect which we can give to the amending act of 1935 is to eliminate the previous requirement that knowledge and wilfullness are constituent elements of the violations named and to hold, as we do, that such elements need not be alleged or proved in order to assess penalties specified by the present act.

The State cites, and we judicially know, that there are many statutes, civil and criminal, imposing penalties for the commission of acts where knowledge, wilfullness, intent or motive are not required by the statute and are not essential to conviction. Generally the acts so prescribed are those not inherently wrong or immoral. They are unlawful only because they are prohibited by law and are called malum prohibitum. There is no novelty in our construction of Art. 6036, 45 Tex. Jur. 2d, Penalties, Sec. 3, p. 4, 70 C.J.S., Penalties, Sec. 6a, p. 395.

Rule 54 of the Commission has been copied above.

If we are correct in our conclusion that Art. 6036 does not require knowledge on the part of a violator under it then it is our opinion that the Commission had no authority to require, as it did, in Rule 54 that a well must be intentionally deviated in order for the violator to be subject to penalties. The Commission can exercise only such legislative power as has been lawfully delegated to it. It has been delegated authority to make rules but it has not been delegated the authority to assess penalties for violation of such rules nor the terms or conditions under which such penalties shall be

imposed. The obvious basis for this statement is Art. 6036, and our interpretation of it. If the Commission can tell the Legislature and the Courts that the penalties prescribed by the Legislature for the infraction of Commission rules cannot be enforced with respect to Rule 54 unless intent is established, then it can so provide as to all rules, regulations and orders adopted by it and so nullify the legislative will, expressed in Art. 6036, that intent is not an ingredient of the violations described. Rule 54, as to intent, is in conflict with Art. 6036, and hence lack of delegated authority to the Commission to include intent in a definition of a rule, order or regulation by it is evident.[6]

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[6] In Stewart v. Humble, 377 S. W. 2d 830, the Supreme Court in discussing the matter of "intent" as related to the violation of Rule 37 of the Commission stated:

"The trial court found that the deviations of Killingsworth No. 3 and Lathrop No. 6 were intentional. Plaintiffs argue that this finding of intent goes to the question of whether or not the bottomhole locations of these two wells reasonably comply with the Rule 37 permits granted in 1935 and 1941. It is plaintiffs' position that, as a matter of law, an intentionally deviated well does not fulfill the test of reasonable compliance. Thus, plaintiffs conclude that Stewart had the burden of proving that the bottomhole locations were necessary to prevent waste or confiscation. We do not agree.

[5] To adopt plaintiffs' position would necessarily mean that an operator who intentionally deviates his well some 5 feet from its surface location can never have the Commission approve his deviated position, while an operator who unintentionally deviates some 10 feet can apply for Commission approval. Logic negates such a result. Whether Stewart has intentionally deviated or not, any alleged 'harm' resulting to plaintiffs is the same. In deciding whether an operator in Stewart's position has reasonably complied with the terms of his permit, the Commission's decision should not be controlled by the question of intent. To hold otherwise would be contrary to the long-recognized principle that when the subject of administration is so vast, complex and complicated, an administrative agency should not be placed in an absolute straight jacket."

See Texas State Board of Pharmacy v. Bloom, 382 S. W. 2d 496, Dallas Civ. App., writ pending.

The applicable rule is well stated in Administrative Law, 1 Am. Jur. 2d, Sec. 132, p. 944, as follows:

> "A legislatively delegated power to make rules and regulations is administrative in nature, and it is not and cannot be the power to make laws; it is only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute. Legislation may not be enacted by an administrative agency under the guise of its exercise of the power to make rules and regulations by issuing a rule or regulation which is inconsistent or out of harmony with, or which alters, adds to, extends or enlarges, subverts, or impairs, limits, or restricts the act being administered."

This principle is sustained in Harrington v. Railroad Commission, 375 S.W. 2d 892, Tex. Sup. Point Twelve is overruled.

Point Thirteen is that the Court erred in its charge to the jury because it failed to submit an issue to the jury as to each appellant inquiring if he intentionally violated any law, rule or regulation of the Commission or had knowledge of such violation. We overrule this Point for the reasons given in our discussion of Point Twelve.

Point Fourteen is that the trial court erred in overruling appellants' objections to the charge to the jury for its failure to inquire as to the existence of a "formal partnership."

By the argument made under this Point and the authorities cited, appellants indicate that by "formal partnership" they mean a conventional or business partnership and not a mining partnership. Since the State by pleading, evidence and argument contend only that appellants were mining partners, we will overrule this Point without further discussion.

Point Fifteen is that the trial court erred in overruling objections to the charge to the jury for failure to submit an issue inquiring as to the existence of a mining partnership between appellants.

The State alleged that appellants were mining partners. It is our opinion that this fact was conclusively established and that the submission of an issue to the jury regarding it was not required.

All appellants, except Mr. Baton, denied under oath, as required by Rule 93, T.R.C.P., that he was a mining partner. The failure of Mr. Baton to deny the partnership is an admission by him that he was a partner as alleged.

Mr. Baton, called as an adverse witness, testified.

> "Q. . . . The question was asked you: 'Isn't it true, in truth and in fact, that all of the people in this particular case, Mr. Harrington, Mr. Allgood, Mr. Lutes, and Mr. Godfrey, and yourself, were all in the HAL Company at the time the well was drilled?' That was asked you, wasn't it?
>
> "A. Yes, sir.
>
> "Q. And isn't this your reply: 'We were all in on the deal to drill the well.' Was that your answer?
>
> "A. Yes, sir; I gave that as my answer.
>
> "Q. And that is your answer, isn't it?
>
> "A. We drilled the well, yes, sir.
>
> "Q. That is, you, Harry M. Harrington, Jr., C. W. Lutes, Mr. Allgood, and Douglas Godfrey; that's right, isn't it?
>
> "A. Yes, sir.

"Q. You drilled the well?

"A. Yes, sir.

. . .

"Q. Now, then, following up our testimony in which you say you drilled this well together, you five, there was a name involved known as the HAL Company, wasn't there?

"A. That's correct.

"Q. And the ones who had the interest in the company, so far as this well was concerned, were the five men you named, weren't they?

"A. I believe that's right, yes, sir."

We copy and adopt the following statement of evidence from the brief of the State, appellants not denying its accuracy:

" 'HAL' Company was the assumed name that originally stood for Harrington, Allgood and Lutes, and its office was Harrington's own office in the Bramlette Building in Longview. Appellants, as Hal Company, acting through Baton, filed with the Railroad Commission the well record, showing their completion of the well and the SW-1 Form Report certifying 'knowledge' of compliance with all of the Railroad Commission rules, regulations and orders in order to get authority to transport the oil produced off their lease; also the E. B. Monthly production records showing the amount of oil produced from their lease. Appellants had an oral agreement as to their proportionate undivided ownership in the well prior to its drilling and they were to pay their proportionate share of the expenses and did receive their proportionate share of the income from the division order, beginning with the first payment by

Humble. Prior to the drilling, appellant Harrington, acting for himself, appellant Allgood and appellant Lutes, had agreed to Allgood's assignment to appellant Baton of one-half of Allgood's one-third interest in the well property, with the agreement for assumption by Baton of his proportionate share of the obligations in the venture. Baton personally furnished the surface pipe at the start of the well and had an oral agreement for his interest with appellant Allgood. Appellants all acted together to finance the drilling and operation by 'pooling the money.'

It was established without dispute that Texas & Pacific Coal & Oil Co., from which appellants obtained their property interests, had ownership and title to the minerals in the property; that beginning in the fall of 1951, appellants proceeded to secure a 'farm-out' agreement from that company and acquired the extent of their rights and title therein by a series of transactions, which were evidenced by a series of letters directed to the company by appellant Harrington for appellants. Such rights and title were later confirmed by legal conveyances, which relate back to the time of the drilling of the well. Appellant Allgood also stated that he originally owned a one-third interest in the well and assigned part of his interest to Baton, and that each of the other appellants paid their part of the costs and expenses involved in the drilling and operation. Appellant Lutes admitted his ownership along with the other appellants in the 'farm-out' from Texas & Pacific Coal & Oil Co. Godfrey, admitted his ownership at the time the well was being drilled and the payment of his expenses, but had nothing whatever to do with the drilling or operation. Appellant Baton also confirmed this.

Appellant Allgood looked to appellant Harrington for progress reports on the drilling, operation, expenses, etc. Appellant Baton also looked to Harrington for all of these matters, going to him and his office to get all information and to sign all reports furnished and pre-

pared by Harrington. Appellant Lutes admitted Harrington acted for appellants in acquiring the lease, and he looked primarily to Harrington as to the operations. Harrington did not testify or refute any of the testimony. The other mining partner, Godfrey, testified he had nothing to do with the drilling or operation. Appellant Baton confirmed this and also the fact that Godfrey was incapacitated with a brain tumor.

Appellant Allgood testified he did not hire or supervise Carter-Jones Drilling Company in the drilling of the well; likewise, appellant Baton testified to the effect that he did not hire or supervise the drilling company. . . .

Harring paid all the bills, which included Carter-Jones' bill; . . .

As to the conduct of joint operations by appellants, Lutes actually hired the pumper, J. C. Ragsdale, and actually gave him his orders, according to Ragsdale; . . . Appellants were billed by Harrington, as shown, and all paid the expenses of the operations in proportion to their working interests. All of the reports on the operations which were required to be filed with the Railroad Commission were, as heretofore shown, filed for appellants by Baton or Harrington, who took the information from the pumper."

Appellants concede that the five elements of a mining partnership are (1) joint ownership of the mineral leasehold or subsurface mineral estate (2) joint operation of the lease (3) sharing of profits (4) community of interest and (5) mutual agency of one of the parties or a superintendent representing the partnership in the management of the leasehold, citing Wagner Supply Company v. Bateman, 118 Tex. 498, 18 S.W. 2d 1052. The Court in this case stated that,

"The rule is that a mining partnership arises by operation of law where co-owners work a mine."

Appellants do not discuss all of the evidence which we have recited on this point, but they do make specific objections to its sufficiency in certain respects. These objections we will answer.

Appellants contend that joint ownership of the leasehold is not shown because it is not shown that they all had acquired legal title to their interest in the leasehold at the time of drilling. This is unnecessary. An equitable title will suffice. See 12 Texas Law Review, p. 415 and authorities there cited. When the leasehold here was delivered after the well was drilled in performance of the farm-out agreement, the title acquired related back to the inception of the farm-out agreement, the agreement clearly evidencing such intention. See Sibley v. Pickens, 273 S.W. 897, Amarillo Civil Appeals, no writ history. Appellants cite Indiahoma Ref. Co. v. Wood, 255 S.W. 212, Amarillo Civil Appeals, no writ history. This case does state that a contract to purchase an interest in an oil leasehold by a trustee does not create a partnership liability on the part of the trustee or his principal prior to the execution of the contract. Here, however, the trustee was not sued and his principal was held not liable because the trustee had no authority to bind his principal in making the contract. We believe the Sibley case correctly states the applicable rule of law.

Appellants direct our attention to several cases with regard to the requirement of "sharing profits." First cited is Bolding

v. Camp, 6 S.W. 2d 94, Tex. Comm. of App. This case holds that acquisition of an interest in an oil and gas leasehold does not of itself create the owner of the interest a mining partner with other owners. Obviously, this case is not controlling here.

Gardner v. Wesner, 55 S.W. 2d 1104, Austin Civil Appeals, writ ref., is a case in which for the loan of certain casing its owner was to receive, if the oil well in which it was to be used was productive, the cost of the casing and ⅛th of the net profits of the well, "but all obligations for drilling and operating were for his (Lessee) account, and my sole interest was to be derived from the net profits resulting from his operation." Clearly there was no joint operation of the leasehold, and the Court correctly so held.

Another case cited is Dunigan Tool and Supply Co. v. Carroll, 60 S.W. 2d 296, Austin Civil Appeals, writ ref. This case is based on the decision in Gardner v. Wesner, supra, and holds that joint operation of the leasehold and sharing of profits, as such, not being shown, there was no mining partnership.

Appellants also cite on this phase of the partnership issue Sec. 7 of Art. 6132-B, V.A.T.S., Texas Uniform Partnership Act, as follows:

> "(1) Except as provided by Section 16 ('Estoppel'), persons who are not partners as to each other are not partners as to third persons.
>
> (2) Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property, or part ownership does not of itself establish a partnership,

whether such co-owners do or do not share any profits made by use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

. . . . .

(e) As a consideration for the sale of good-will of a business or other property by installments or otherwise.

(5) Operation of a mineral property under a joint operating agreement does not of itself establish a partnership."

Appellants contend that these articles apply to the partnership issue before the Court. We agree. Appellants do not contend that these provisions require us to hold that a mining partnership is not shown. We hold that they do not so require.

Appellants say that since the well in suit has not produced oil for a year and the lease terminated for nonproduction that the mining partnership, if any, has thereby been dissolved, the effect of which is, they say, to relieve the partners from liability for civil penalties (except the actual wrongdoer). They cite in support Wright v. E-Z Finance Co., 267 S.W. 2d 602, Dallas Civ. App., writ ref., n.r.e.

There is no evidence before us that the partnership has dissolved or that the lease has been surrendered to lessor. We do not express any opinion on the right of lessor to ter-

minate the lease or concerning its automatic termination for nonproduction under the facts here disclosed. The mere cessation of business by the partnership, if such be true, is not enough to show its dissolution. Partnership, 44 Tex. Jur. 2d. Sec. 181, p. 510.

The E-Z case involves a business partnership and the liability of it and its members for penalties for usury after the dissolution of the partnership by death of one of the partners. Since no dissolution of the partnership is shown in the case before us, we need not determine what effect such dissolution would have.

We have considered all of the specific objections which appellants have presented under this point and have disposed of them to the best of our ability. Since appellants have not further analyzed the evidence, recited above, to sustain the existence of a mining partnership between appellants, we also refrain from so doing. We have, however, carefully examined such evidence and we find from it that all of the component elements of a mining partnership between appellants is established by the undisputed evidence and as a matter of law. Point Fifteen is overruled.

Point Sixteen is that the court erred in overruling objections to the following portion of the jury charge on the ground that it constituted a global submission of statutes and rules of the Commission:

> "... this suit is brought by the State of Texas against the defendants for recovery of penalties provided by statute for violations of the laws of this State and the rules, regulations and orders of the Railroad Commission of Texas."

The above language of the charge was not contained in any issue submitted to the jury. It was contained in general instructions made by the court with respect to certain issues which were submitted. The statement merely advised the jury of the nature of the suit. It amounted to no more than the court advising a jury that "this is a suit for damages." The instruction was not improper. Certainly it was not harmful. The pleadings were before the jury and they showed the nature of the suit to be as the court instructed. Point Sixteen is overruled.

Point Seventeen is that the trial court erred in failing to define the word "violator" as used in its charge.

The word "violator" is found only once in the charge, in the sentence which immediately follows the quotation made by the charge in discussing Point Sixteen. We quote the sentence:

> "Under the statute the violator is subjected to a penalty not to exceed $1,000.00, for each day of each violation which you may find from a preponderance of the evidence was committed."

The trial court, in this instruction, necessarily had reference to Art. 6036 which prescribes penalties for any person "violating" the statute, rules, etc. The instruction was accurate and in the language of the statute.

The trial court did not inquire of the jury whether any appellant had "violated" the statute or rules of the Commission. The instructions in which the word "violator" is found preceded issues relating only to the amount of penalties to be assessed which issues were conditionally submitted

on an affirmative answer to the Issue I which inquired if appellants' well was bottomed off their lease.

The jury, as reasonably intelligent persons, must have known that when they answered Special Issue I in the affirmative that this was a violation of the rules of the Commission, which were in evidence, otherwise they would not have been asked to assess penalties. We believe it beyond question that the jury understood the meaning of the word "violator" as used in the charge and that definition of it was not required. Point Seventeen is overruled.

Point Eighteen is that the trial court in overruling objections to the following portion of the court's charge:

> "The amount of penalty, if any, to be assessed for each day of each violation shall be determined by you in your sound discretion, and in arriving at the amount of such penalties, if any, you may consider such of the following, if any, as you find are established by a preponderance of the evidence and none other: (1) The nature and character of the conduct involved, (2) the degree of culpability of the wrongdoer, (3) the extent to which such conduct offends a public sense of justice and propriety, (4) and heedless and reckless disregard of the rights of others, and (5) the character and extent of the injury inflicted. The penalty, if any, should be in an amount, which you find from a preponderance of the evidence will compel respect for the law by the defendants and others, and will deter the commission of like acts in the future by the defendants and others."

The objections to these instructions were that they were extraneous to any violation of the pertinent statutes and rules and that they constituted a comment on the weight of the evidence.

This charge was not a comment on the weight of the evidence. All of the enumerated matters which the jury was told could be considered were carefully safeguarded by the use of the words "if any." Adams v. McHam, 310 S.W. 2d 145, Amarillo Civ. App., writ ref., n.r.e.

It is proper, under Rule 277, T.R.C.P., for the court to give explanatory instructions in the charge, ". . . even in the nature of general charges, whenever there is good need for same to properly aid the jury . . ." Boaz v. White's Auto Stores, 141 Tex. 366, 172 S.W. 2d 481, quoting approvingly from 20 Tex. Law Rev. p. 36.

It is the duty of the court to instruct the jury as to the proper measure of damages in a proper case. Damages, 17 Tex. Jur. 2d Sec. 285, p. 344. The same text Sec. 299, p. 367, states, "The jury should be instructed as to the particular elements that they may properly consider in the particular case on trial in ascertaining the amount of the award of damages."

While penalties are sought here, not damages, there are proper matters which a jury may consider in the exercise of its discretion in assessing penalties, within legal limits, which are authoritatively stated to be:

> "The basic rule may be said to be that the amount to be awarded in any case is measured by the rule of just punishment, rather than that of fair compensation. And the amount of the award depends, among other things, on the nature of the wrong, the character of the conduct involved, the degree of culpability of the wrongdoer, the situation and sensibility of the parties concerned, and the extent to which such conduct offends a

public sense of justice and propriety. Although the amount should be large enough to command respect for the law and to deter others from similar infractions, it should not be excessive or oppressive." 17 Tex. Jur. 2d p. 255-6.[1]

The trial court carefully incorporated in its charge these judicially approved elements for consideration by the jury and we approve its action. It seems to us that these explanatory instructions are as much to the benefit of appellants as to the State, especially so since appellants do not admit that they were conscious wrongdoers. Point Eighteen is overruled.

Point Nineteen presents objections to that portion of the court's charge, copied above, which relates to the instruction that the penalty assessed should be in an amount that will compel respect for the law and deter the commission of similar acts, the objections being that it is a comment on the weight of the evidence and does not condition the assessment of penalties on a finding that any violation was intentional.

We do not consider this portion of the charge to be a comment on the weight of the evidence for the reasons stated in our discussion of the preceding point.

We also do not agree with the contention that it was essential for the State to prove that violation of Rule 37 was intentional before penalties could be assessed under Art. 6036. We have given our reasons for this conclusion in discussing Point Twelve. Point Nineteen is overruled.

[1] The text is discussing exemplary damages, but such damages are in the nature of penalties.

Points Twenty and Twenty-one are that the court erred in overruling objections that the following portion of its charge is a comment upon the weight of the evidence and instructs the jury upon a legal presumption and was prejudicial, and that it fails to incorporate the requirements that the violation be intentional:

> "Each of the defendants at all pertinent times is charged with knowledge of the laws of the State of Texas and the rules, regulations, and orders of the Railroad Commission. In order to drill the well in question, a permit to drill the same had to be obtained from the Railroad Commission, and the well drilled under such permit was required to be bottomed on the defendants' lease."

Appellants argue this point as though this presumption stated in the Court's charge was rebuttable. This is incorrect. "All persons are conclusively presumed to know the law." 23 Tex. Jur. 2d Sec. 73, Evidence, p. 114. The instruction given was appropriate under this record. Without this explanation of the law, the jury would have been easily misled.

Nor was the instruction, in our opinion, a comment on the weight of the evidence. The trial court was, in giving this instruction, merely performing his duty and instructing the jury on the law applicable to the fact issues submitted to it. 31 Tex. Jur. 2d, Instructions, Section 57, p. 577.

Appellants state that it is not always necessary in drilling an oil well to obtain a permit from or consent of the Commission. No authority to this effect is cited. The instruction applied only to appellants' well, and they do not deny that, as to it, they were required to obtain a permit from the Commission.

Points Twenty and Twenty-one are overruled.

Point Twenty-two is that the trial court erred in submitting Special Issue 2 inquiring of the jury what a reasonable penalty would be for each of the sixteen days on which the well was drilling over objections that the issue assumes that the well was wrongfully drilled and assumes existence of conditions precedent not established by the evidence.

We presume that the condition precedent referred to is that the well was intentionally deviated. We overrule this contention for reasons heretofore given.

We also overrule the first contention which is based on the argument that the well was drilled straight for a ways before it started to slant and that the straight drilling was lawful. This is undoubtedly correct. However, we hold that a well is an entity, having a top and a bottom, and not divisible into good and bad segments. This well, from the surface to its bottom, was an unlawful well. Point Twenty-two is overruled.

Appellants' Point Twenty-three reads:

> "The Court erred in submitting Special Issue No. 4 inquiring as to a reasonable penalty for each of the 3,650 days that the well was operated over the following objections of the defendants:
>
> (a) Such issue assumes facts not established by the evidence;
>
> (b) Such issue is a coment upon the weight of the evidence;
>
> (c) Such issue is not supported by the plaintiff's pleadings;

(d) Such issue erroneously assumes that the operation of the well in question is governed by statewide Rule 37;

(e) Such issue erroneously assumes that each of the defendants operated the well from its inception;

(f) Such issue assumes the existence of a partnership or agency among the defendants;

(g) There is no evidence upon which to base the submission of this issue;

(h) There are no pleadings upon which to base the submission of this issue."

Special Issue No. 4 reads:

"SPECIAL ISSUE NO. 4:

What sum of money, if any, do you find from a preponderance of the evidence to be a reasonable penalty for each of the 3,650 days said well was operated?

Answer in dollars and cents, or none.

ANSWER: $80.00"

We have held in sustaining Point Six that the evidence does not conclusively show that this well produced oil for 3,650 days. If by the word "operated," as used in this issue, is meant production of oil, then this point must be sustained because it assumes an unproven fact. Subject to our determination of this question later in this opinion, we overrule the other objections to the issue. All of the objections except that it is a comment on the weight of the evidence have been discussed and determined under other points. In view of our disposition of the following point it is not necessary that we determine this contention.

Point Twenty-four is that the trial court erred in not defining the word "operated" in Special Issue No. 4, copied above.

It is our opinion that the trial court should have acceded to appellants' request and defined the word "operated" in Special Issue 4.

This word, under normal conditions, is a word of common usage and understanding. It is used here, however, under abnormal circumstances. There is a large record containing the testimony of expert witnesses and numerous exhibits which are not readily absorbed by the mind. The jury very well could have believed, since they were not queried about the matter, that the Trial Judge had found, perhaps from some of these complex exhibits, that this well had produced oil for each of the 3,650 days stated in the issue. The State so contends now. The Trial Judge, however, did not so find. It is in the record that he made these observations after the verdict:

> "MR. HARRINGTON: Then you are finding on the basis of 3,650 days for the well not being plugged, rather than on the basis that it had produced that many days?
>
> "THE COURT: That is correct. Of course, it was submitted to the jury with the word 'operated 3,650 days.'
>
> "MR. HARRINGTON: The Court's judgment is on the basis that it has not been plugged that number of days?
>
> "THE COURT: That it violated Rule 37 for 3,650 days."

We concur in the Trial Judge's refusal to find that this well produced oil for 3,650 days and agree with him in regard

to his interpretation of Rule 37 and his conclusion that this well violated its provisions as long as it remained unplugged. Our problem is simply to determine if this issue, as framed, could have influenced the jury in assessing a greater penalty than it would have assessed if it had been instructed that failing to plug the well for 3,650 days was the only wrongful act which appellants had committed on 3,650 days. The amount of penalties assessed in this case for operating the well for 3,650 days is about $292,000.00. We believe a jury assessing such huge penalties should know exactly for what violation such penalties are assessed. The jury has a very wide discretion in cases of this character. It may fix the penalty at one cent or $1,000.00 a day. To wisely exercise this discretion it should certainly know what offense has been committed and what the facts and circumstances are concerning it.

We believe that the trial court should have defined the word "operated" in Special Issue No. 4, and we sustain this point. In view of another trial, we suggest that maintenance of the well in an unplugged condition be submitted to the jury for assessment of penalties if this violation is again relied upon by the State.

Points Twenty-five and Twenty-six are that Art. 6036 is unconstitutional for the reason that it violates Art. 1, Sec. 19 and Art. 1, Sec. 13, of the Constitution of Texas, and Art. 14, Sec. 1 of the Constitution of the United States.

Art. 1, Sec. 19 of our Constitution is the "due course of law" provision and Sec. 13 prohibits the imposition of excessive fines. The Federal Constitution provision referred to is the "due process of law" provision.

The contentions under these points were answered adversely to appellants by this Court in Culver v. Smith, 74 S.W. 2d 754, writ ref., opinion by Associate Justice Blair, from which we quote:

> "Appellants further contend that the penalties of 'not more than One Thousand Dollars ($1,000.00) for each and every day of such violation' of any provision of the act as provided in article 6036, as amended by Acts of the 42nd Legislature, 1st Called Session, c. 26, §3 (Vernon's Ann. Civ. St. art. 6036), render the act void as being in contravention of section 13 of article 1 of the Texas Constitution, in that it imposes execssive fines and authorizes unusual punishment, and as being in contravention of section 19 of article 1 of the Texas Constitution, and of section 1 of article 14 of the Amendment to United States Constitution, in that it permits and authorizes the deprivation of their property without due course of law, and of their liberty without due process of law. We do not sustain these contentions.
>
> . . .
>
> The fact that article 6036 imposes a penalty of 'not more than one thousand dollars per day' instead of a flat penalty of $1,000 per day, thus permitting the imposition of a small penalty of perhaps only a few cents per day, has been held to be sufficient within itself to take such statute out of the constitutional inhibitions sought to be invoked by appellants. Noble v. Carlton, Governor of Florida, et al. (D.C.) 36 F. (2) 967."

These Points, the last Points in appellants' general brief, are overruled.

Appellant Baton has filed a separate brief which we will now consider.

Appellant Baton was exonerated from liability for penalties for the drilling of the well. He was assessed penalties of $2.50 a day for $3,650 days for operation of the well.

Many of the points in appellant Baton's brief are to the same effect as points made in appellants' general brief. These points will not be restated or discussed. Our rulings on them are the same as indicated above. We will discuss only additional points made by Mr. Baton. His Fifth Point is that the verdict and judgment against him is so against the great weight and overwhelming preponderance of the evidence as to be clearly wrong. Since this cause is being reversed and remanded for a new trial insofar as the judgment went against Mr. Baton, we will not recite more of the evidence upon which the judgment was based because it may not be the same upon retrial. The evidence referred to above is sufficient, in our opinion, to establish the legal liability of Mr. Baton as a member of a mining partnership for penalties for violation of the rules of the Commission by the parnership in the production of oil from the operation of this well,[8] and that a finding to such effect is not against the overwhelming weight and preponderance of the evidence, and is not clearly wrong or manisfestly unjust.

Mr. Baton's Point Seven is that the trial coourt erred in admitting in evidence letters written by Mr. Harrington to an oil company over his objection that such letters were

[8] See 40 Am. Jur., Partnership, Sec. 196, p. 266-7, 68 C. J. S., Partnership, Sec. 182, p. 637.

hearsay as to him and were written before he acquired a conveyance of an interest in the oil and gas lease here involved.

Appellant does not state what these letters contain, but from the record we learn that they related to the assignment of the oil and gas lease to Harrington, Allgood and Lutes in which Baton subsequently acquired an interest and on which leasehold the well in suit was drilled. The letters were admitted to show a mining partnership between appellants. Mr. Baton did not deny this partnership, hence the admission of these letters could not have harmed him. We are further of the opinion that a mining partnership was established, as a matter of law, between appellants independently of the content of these letters. This Point is overruled.

We affirm the judgment of the trial court assessing penalties against Harrington, Lutes and Allgood and refusing to assess penalties against Baton and Godfrey for the sixteen days on which the well in suit was drilled. In all other respects, the judgment is reversed and this cause remanded for further proceedings consistent with this opinion.

Robert G. Hughes, Associate Justice

Affirmed in Part;
in Part Reversed and Remanded.
Filed: November 18, 1964.

ON MOTION FOR REHEARING

The State asserts that we erred in sustaining appellants' Point Twenty-four and holding that the word "operated" used in Special Issue No. 4 should have been defined for the reason that the record does not show that appellants properly preserved such Point in that they failed to submit a definition of such word and they requested submission of a similar issue using the same word, "operated," without defining it.

We will not explore these reasons for altering our opinion because even though Special Issue No. 4 stands unscathed it will not support a judgment for the penalties assessed by the jury in answering such issue.

The State contends otherwise, saying, ". . . this Court erred in failing to render judgment based on the undoubted operation of the well for the 3,650 days it was *operated unplugged.* : . . This was the basis for the Trial Court's judgment."

This is an incorrect appraisal of the trial court's basis for judgment. That basis was, as clearly shown by his remarks copied in our opinion, that the well was "unplugged" for 3,650 days, not that it was "operated unplugged." The court also stated that "it," not plugging the well, violated Rule 37 for 3,650 days. Rule 37 merely states, in this respect, that a well drilled in violation of it "shall be plugged." It does not provide that a well shall not operate unplugged.

By no stretch of the imagination could the assumption made by the court in Special Issue No. 4 that the well was operated 3,650 days be tortured into an assumption that the well was merely in an unplugged state for 3,650 days. It is, of

course, undisputed that the well was unplugged for this period of time, but if the State wished the jury to assess a penalty for this violation, it should have requested submission of an appropriate issue. Furthermore, it is the duty of the trial court to submit controlling issues made by the pleadings and evidence. Rule 279, T.R.C.P. We apprehend none will deny this was a controlling issue.

The State's motion and all appellants' motions for rehearing are overruled.

We have not heretofore adjudged costs in this case, and we called upon all parties to make suggestions relative thereto. After considering the suggestions made, we adjudicate costs as follows:

Trial Court Costs

As no judgment against appellant Baton for any amount has been renederd the assessment of such costs against him will abide the event.

Appellants Harrington, Allgood and Lutes are each assessed one-third of one-fourth of such costs. Assessment of the remainder of such costs will abide the event.

Costs of Appeal

Appellants Harrington, Allgood and Lutes are each assessed one-third of one-fourth of such costs.

Three-fourths of such costs are assessed against the State of Texas.

No appellate costs are adjudged against Mr. Baton.

Robert G. Hughes, Associate Justice

Motions Overruled
Filed: December 9, 1964

OPINION OF THE SUPREME COURT OF TEXAS

(Record, Item X—officially reported in 407 S.W. 2d 467)

IN THE SUPREME COURT OF TEXAS

No. A-10592

THE STATE OF TEXAS,

Petitioner,

v.

HARRY M. HARRINGTON, JR., et al.,

Respondents.

From Travis County Third District

This is a civil suit for penalties. The State of Texas brought the suit under authority of Article 6036[1], Vernon's Annotated Civil Statutes, alleging that the defendants, Harry M. Harrington, Jr., Reid H. Allgood, Charles W. Lutes, J. W. Baton

[1] "Article 6036

"In addition to being subject to any forfeiture that may be provided for by law and to any penalty that may be imposed by the Commission for contempt for the violation of its rules, regulations, or orders, any person violating any of the provisions of this Act or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or violating any rule, regulation, or order of the Commission promulgated thereunder, shall be subject to a penalty of not more than One Thousand Dollars ($1,000) for each and every day of such violation, and for each and every act of such violation, to be recovered in any Court of competent jurisdiction in Travis County, or in the county of the residence of the defendant, or, if

(Footnote continued on following page)

and Douglas Godfrey had drilled and operated a deviated oil well across their own lease lines in violation of the laws of the State of Texas, and in violation of the rules, regulations and orders of the Railroad Commission of the State of Texas. The Court held as a matter of law that the well was *drilled* during a period of 16 days, and was *operated* in violation of law during a period of 3,650 days. Special issues were submitted to a jury and in answer to such issues, the jury found (1) that the well in question was bottomed off the defendants' lease; (2) that a reasonable penalty for each day of the 16 days the well was being drilled was the sum of $800.01. As to this penalty, the jury assessed the sum of $266.67 per day against each of the defendants Harrington, Allgood and Lutes, and none against the defendants Baton and Godfrey; and (3) that a reasonable penalty for each of the 3,650 days the well was *operated* was the sum of $80.00. In answer to an additional issue, the jury found the amount of the operating penalty per day against each of the defendants to be as follows: Harrington—$31.00; Allgood—$15.50; Lutes—$31.00; Baton—$2.50 and Godfrey—none.

(Footnote continued from preceding page)
there be more than one defendant, in the county of the residence of any of them, or in the county in which the violation is alleged to have occurred, such suit by direction of the Commission to be instituted and conducted in the name of the State of Texas by the Attorney General or by the county or district attorney where such suit is brought. The recovery or payment of any such penalty shall not authorize the violation of any provision of this Act, or Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation, or order of the Commission promulgated thereunder.

"Any person aiding or abetting any other person in the violation of this Act, or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation, or order of the Commission promulgated thereunder, shall be subject to the same penalties as are prescribed herein for violation thereof by any such other person."

On November 26, 1963, after receiving the verdict and discharging the jury and before any further action by the Court, the State of Texas filed its motion for the admission of additional evidence which was granted over the objection of the defendants, Harrington, Allgood and Lutes. The evidence introduced was from the deposition's testimony of Harrington. The evidence was related to the 16-day drilling period. The State contends that this testimony was admissible under Rule 270[2], Texas Rules of Civil Procedure. The above named defendants contested the motion on the ground that "the amount of days of drilling . . . . upon which [judgment] is now sought *be entered* by the plaintiff, is a very controversial matter, and under Rule 270 . . . . may not at this time be received by the Court."

On December 12, 1963, the defendant J. W. Baton, after the Court had received the jury verdict, filed a motion for permission to introduce additional evidence. This motion was granted and evidence was introduced without objection. The State also introduced additional evidence in connection with the evidence introduced by Baton and the defendants; Harrington's, Allgood's and Lutes' objection thereto was overruled. The question raised because of the late introduction of all of this evidence will be discussed in connection with the State's points of error.

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[2] "Rule 270. Additional Testimony

"At any time the court may permit additional evidence to be offered where it clearly appears to be necessary to the due administration of justice. Provided in a jury case no evidence on a controversial matter shall be received after the verdict of the jury."

On the 3rd day of January, 1964, the trial court signed and entered its judgment. The decretal portion of the judgment reads as follows:

> "It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court, that the State of Texas do have and recover of and from Harry M. Harrington, Jr., the sum of $117,416.72 with interest thereon from the date of judgment until paid at the rate of 6% per annum, that the State of Texas do have and recover of and from Reid H. Allgood the sum of $60,841.72 with interest thereon from the date of judgment until paid at the rate of 6% per annum, that the State of Texas do have and recover of and from Charles W. Lutes the sum of $117,416.72 with interest thereon from the date of judgment until paid at the rate of 6% per annum, and that the State of Texas do have and recover of and from J. W. Baton the sum of $9,125.00 with interest thereon from the date of judgment until paid at the rate of 6% per annum; and that said sums shall be payable to the Treasurer of the State of Texas for the benefit of the General Revenue Fund of the State of Texas; and
>
> "It is also ORDERED, ADJUDGED AND DECREED that all court costs are hereby taxed against the said Harry M. Harrington, Jr., Reid H. Allgood, Charles W. Lutes and J. W. Baton, jointly and severally; and
>
> "It is also ORDERED, ADJUDGED AND DECREED that execution shall issue in the name of the State of Texas for the collection of the judgment herein provided and for all court costs incurred in this case; and
>
> "It is further ORDERED, ADJUDGED AND DECREED that the State of Texas take nothing against Douglas Godfrey, and that he be discharged with his costs."

The Court of Civil Appeals affirmed the judgment of the trial court assessing penalties against Harrington, Lutes and

Allgood and refusing to assess penalties against Baton and Godfrey for the 16 days drilling period, but in all other respects, the trial court's judgment was reversed and the cause was remanded to the trial court. 385 S.W. 2d 411, We reverse the judgment of the Court of Civil Appeals and affirm that of the trial court.

We granted the State's application for writ of error primarily to review the action of the Court of Civil Appeals in holding that "the $80.00 per day penalty found by the jury in Special Issue No. 4[3] for the 3,650 days the well was operated would not support the judgment of the trial court for such penalties," and to review the holding that the trial court erred in not defining the word "operated" appearing in Special Issue No. 4. The application of Harrington et al. was granted and is here for review because of the granting of the State's application.

A statement of the pleadings and the facts is essential to a proper understanding of our holding.

The Pleadings

The State alleged that the defendants were the co-owners of an oil and gas lease[4] on land situated in Wood County,

[3] "SPECIAL ISSUE NO. 4: What sum of money, if any, do you find from a preponderance of the evidence to be a reasonable penalty for each day of the 3,650 days said well was operated?
"Answer in dollars and cents, or none.
"ANSWER: $80.00."

[4] "The Oil and Gas Lease involved was executed by Texas and Pacific Oil Company, Lessor to the Defendants Harrington, Allgood and Lutes. The defendants Baton and Godfrey acquired their respective interests through purchase by assignment from Allgood to Baton, and by assignment of a fractional interest from Baton to Godfrey. The assignment to Baton is dated May 9, 1952, and the assignment to Godfrey is dated January 1, 1953.

Texas, and were *mining partners* in the drilling, completion and production of oil from a deviated well surfaced on the land described in the lease, but bottomed on adjoining land. The State pleaded elements to establish a mining partnership, and that the defendants operated under the assumed name of "HAL CO."; that on February 5, 1952, "HAL CO." made application to the Railroad Commission of Texas for a permit to drill an oil well at "a particular location, to-wit, 234 feet South of the Northline of said lease and 234 feet East of the West line of said lease." On February 28, 1952, Permit Number 42,688, authorizing the drilling of an oil well was granted. The well was drilled to completion on or about April 21, 1952.

The State further alleged that the defendants made preparations to drill such oil well (to be known as No. 1, Texas Pacific Coal Co. Mineral Fee tract, 20 ac., Charles Duncombe Survey, Hawkins Field, Wood County, Texas), but determined and made plans to drill such well at a location other than the location prescribed in the permit by making the surface location, that is, the mouth of the well, at the location prescribed in the permit, but secretly deviating and slanting the well underneath the surface of the ground in such manner that it would be closer to the west line of the defendants' said lease than authorized by the permit and in such manner that it would cross the south boundary line of said lease, and be secretly bottomed on and under other lands and leases owned by other persons. The State pleaded that the defendants entered into a fraudulent conspiracy among themselves to slant the oil well in a westerly direction

and file a false well record, by which it would be represented to the Railroad Commission that said well was drilled straight down within three (3°) degrees of vertical and bottomed on and under the defendants' lease at the location prescribed in the permit, when in truth and in fact said well would be deviated and slanted more than thirty (30°) degrees from vertical and bottomed on and under the lands of other persons.

The defendants Harrington, Allgood and Lutes filed a general denial of all the allegations in the State's pleadings and specifically denied under oath that they or either of them were ever partners, or mining partners doing business under the name of "HAL CO."

We make no further reference to the defendant Godfrey since the trial court rendered judgment in his favor and there was no appeal from such action.

The Undisputed Facts

On February 28, 1952, Permit No. 42,688 authorizing the drilling of an oil well by "HAL CO." on the Defendants' lease was granted. Drilling of the well began April 6, 1952, and drilling continued through April 21, 1952, a period of 16 days. The documentary evidence established that on April 28, 1952, the well was tested, produced and operated. Railroad Commission Form SW-1, filed with the Commission by the Defendants, signed by J. W. Baton for the "HAL CO.", acknowledged by H. M. Harrington, all on April 28, 1952, and registered and approved by the Railroad Commission on April 30, 1952, shows the producer's certificate of compliance and

authorization to transport the well's production from the lease. The E. B. Monthly Production Reports filed by and on behalf of the petitioners and the payments to petitioners by Humbe for the oil production runs shows that the wells from and after April 28, 1952, produced a full monthly allowable for the month of May, 1952 and each month thereafter through the month of June, 1962. According to the undisputed testimony of witness Ray Payne, and his compilation report, the well produced a total of 283,133 barrels. The well was unplugged fo more than ten (10) years. The well was finally ordered shut down by the Railroad Commission and the pipeline severed on July 31, 1962. Thus, the State established that the well was producing its allowable for a period of at least 3,740 days. However, the State pleaded a penalty for only 3,650 days and judgment was entered on that basis. The State's evidence shows that the well was maintained in an operable condition from the day production began on April 30, 1952, until July 31, 1962.

The State's evidence further shows the testimony of Ray Payne, Director of Field Operations for the Railroad Commission, who testified that the so-called "shut-down" or "allowable" orders of the Railroad Commission do not mean or imply that the well is actually shut down or not produced for whatever number of days production is not allowed, but it simply restricts the total production for a month to the number of barrels permitted in terms of so many days allowable; that the well is still legally permitted to produce every day of the month as long as it only produces the total number of barrels allowable expressed in terms of so many days'

production; that "the Commission permits the gas-oil ratio surveys to be filed on a calender basis and the wells to be tested on a calendar basis." The State contends that the "so-called 'shut down' or 'allowable' orders of the Railroad Commission constitute no evidence whatever as to whether the wells were actually produced any number of days, as it is still permissible to produce some oil every day of the month."

Undisputed Evidence as to Deviated Drilling

The State introduced in evidence Railroad Commission Form 2, the well completion report, which was signed and sworn to by defendant J. W. Baton for the "HAL CO.", before H. M. Harrington, stating that he had "knowledge of the facts and matter herein set forth and that the same are true and correct." Next, the State introduced in evidence Railroad Commission Form 3 filed for "HAL CO." and signed by Baton and Lutes. The last item under "Date of Potential Test" reveals that the well was completed at 3:15 p.m., April 21, 1952. The State also, after the verdict had been received, but before judgment, introduced Harrington's deposition. His evidence corresponded with the report as to the number of days of actual drilling. However, he did testify that "the date the drilling began might have been as early as April 4."

The State's Exhibit 46 and the testimony of Thomas H. Sellers, Sperry Sun surveyor, showed that the slanted well began its deviation at 100 feet and continued its deviation to the total depth of 5,090 feet, drilling that number of feet in sixteen days, which would result in an average drilling of at

least 318 feet per day. The State also introduced an expert witness, Charles Pollard, who testified that in order to drill a slant well like the one in the instant case, it is necessary for a directional driller to prepare plans, charts, schedules and diagrams in advance so that the bottom of the hole can be located at the desired objective. Pollard testified that from a study of the State's Exhibit 45, the well in the instant case was intentionally deviated. The defendants made an attempt to destroy the effectiveness of this testimony through the cross-examination of Pollard. The cross-examination of the witness, Pollard, was conducted by Mr. Harrington, one of the defendants. The defendants claim that Pollard's testimony on cross-examination shows that the deviation *could have been done with one tool, at one time.* It is their contention that such testimony raises an inference at least that the directional drilling could have been limited to one day. We have carefully examined the testimony and find that Pollard did not testify, as claimed. Pollard did testify in answer to a hypothetical question that "one deviation instrument" or "tool" could have been used to deviate the well, but no question was asked as to what length of time would have been required to effect the deviations found in the present case.

The State proved by expert witnesses, Thomas Sellers and Grady Bell, that in July, 1962, after the well was closed down by the Railroad Commission, they made a "directional survey" of the *bore-hole* of the well by the use of accurate instruments and methods, and found that the vertical depth of the well was 4,737.74 feet, that the horizontal displacement of the bottom of the well was 1,664.73 feet in a direction of

North 87 degrees 56 minutes West from the surface location of the well, and that the actual length of the *bore-hole* was 5,090 feet. The State further proved by a qualified land surveyor, Ralph Andrews, that the *bore-hole* of the well crossed the property boundary line so that the bottom of the well was in a different tract of land than the surface location authorized by the permit to drill the well. None of the evidence, showing that the well was slanted and bottomed off the lease, was controverted or denied.

Additional evidence will be related later in passing upon various questions presented in the application for writ of error. The defendants offered no direct evidence. The only evidence introduced by the defendants was that elicited from the witnesses through cross-examination, or by the introduction of parts of the depositions of the defendants, Godfrey, Allgood, and Lutes. Godfrey's deposition had been taken in another case. However, it was stipulated that the deposition could be introduced in evidence in this case since the same lease and well were involved.

Opinion

Before final disposition of the points presented in the State's application for writ of error, we must rule upon the questions presented in the defendants' application which strike at the very foundation of the State's alleged cause of action. Some of these questions are raised by all of the petitioners and some by Baton alone. Our conclusions hereinafter reached upon each of these questions lead to the final holding that the State of Texas discharged its burden of

pleading and proving a penalty action against all of the petitioners as contemplated by Article 6036, supra.

Article 6036 is a civil penalty statute enacted for the primary purpose of promoting and encouraging law enforcement and deterring violations of the rules, regulations and orders of the Railroad Commission. The State charged that Rule 37, and related rules, were violated.

Jurisdiction

The defendants assert that the District Court was without jurisdiction of this cause, since direction by the Commission to the Attorney General to file the suit must be made pursuant to a hearing before the Commission of which the defendants had notice and opportunity to be heard. Thus, the defendants are urging that no hearing was held, and therefore this suit must be abated because the State does not have the authority to maintain the suit. We disagree. The defendants rely upon such cases as State v. Crown Central Petroleum Corporation, et al., 369, S.W. 2d 458, (Tex. Civ. App., 1963), ref. n.r.e., and Ex Parte Young, 209 U. S. 123, 28 S. Ct. 441, to support their contention. These cases are not in point. The controlling statutes there under consideration made it clear that the Commission, or the particular administrative body involved, should first determine and act on the question involved. Upon examination of Article 6036, it is readily apparent that the Legislature has not given the Railroad Commission exclusive original jurisdiction, but has explicitly authorized the court to hear the matter in the first

instance. The issue involved in this case is one inherently judicial in nature. This Court in Gregg v. Delhi-Taylor Oil Corporation, 162 Tex. 26, 344, S.W. 2d 411 (1961), said:

> ". . .[W]here the issue is one inherently judicial in nature . . ., the courts are not ousted from jurisdiction unless the Legislature, by a valid statute, has explicitly granted exclusive jurisdiction to the administrative body."

The Attorney General of Texas has properly brought this suit as the representative of the Railroad Commission of Texas.

STATE WIDE RULE 37, Rule 54

Hawkins Field—Rule 1

We agree with the State that Rule 37 is of state-wide application except as modified by special rules for individual fields. The Court of Civil Appeals has so held. We agree that the state-wide Rule 37 applies to the Hawkins Field, the field in which the well involved is located. Section (a) of the rule provides for spacing distances, application and hearing on exceptions. Section (b) provides for a hearing on exceptions and is a duplication of parts of Section (a). Section (c) provides for the filing of a plat. The following pertinent sections of Rule 37 read as follows:

> "Section (d). In the interest of protecting life and for the purpose of preventing waste and preventing the confiscation of property, the Commission reserves the right in particular oil and gas fields to enter special orders increasing or decreasing the minimum distances provided by this rule.

"Section (e). No well drilled in violation of this Rule without special permit obtained, issued or granted in the manner prescribed in said rule, and no well drilled under such special permit or on the Commission's own order which does not conform in all respects to the terms of such permit shall be permitted to produce either oil or gas, and any such well so drilled in violation of said rule, or on the Commission's own order shall be plugged.

"Section (f). This rule shall in no wise rescind, abrogate or modify the provisions of special orders applicable to the spacing of wells in particular fields requiring minimum spacing distances either greater or smaller than provided herein."

Hawkins Field Rule 1 Section (a) is identical with Section (a) of State-Wide Rule 37, while Section (b) of Hawkins Field Rule 1 provides that the general order on subdivision of property shall apply. Rule 37 is a state-wide general rule and the regulatory purpose of the rule is clearly evidenced in Section (e), supra. Any departure from the rule is to be deemed to be in the nature of exceptions, by virtue of special orders, with respect to the spacing of wells. See Railroad Commission of Texas v. Shell Oil Co., 139 Tex. 66, 161 S.W. 2d 1022 (1942). Provision for exception to the rule as to the spacing of the wells in certain fields, as prescribed by special order, is set out in Section (f), supra, of Rule 37. Hawkins Field Rule 1 (c) is such a particular field and special rule or order. Read in harmony with the general Rule 37, it is clear that Hawkins Field Rule 1 merely requires larger spacing requirements between adjoining wells or property lines. Hawkins Field Rule 1 does not otherwise change, modify or limit the applicability of Rule 37. We note that

Hawkins Field Rule 1 has no section comparable to Section (e) in Rule 37. The intention of the Railroad Commission in the adoption of Rule 37 was to outlaw operation and production of all wells drilled in violation of the permit and spacing requirements and to require plugging of all wells so drilled. It was never intended for Hawkins Field Rule 1 to abrogate Rule 37 so as to permit such wells to produce, operate and remain unplugged while at the same time requiring more onerous spacing requirements.

The defendants contend that the drilling of a deviated well across their own lease lines is not in violation of any rule of the Railroad Commission. It is argued that Rule 37 only controls the number of wells on a tract and their surface location and does not control the deviation or bottom hole location of wells. The argument is that if any rule controls it is Rule 54, rather than Rule 37. We decline to hold that Rule 54[5] is the sole rule which controls in determining whether or not the State has a cause of action to recover penalties under Article 6036, supra. The defendants admit that the operation of an unintentionally slanted well drilled in violation of Rule 54 or a "straight hole clause"[6] is an offense.

[5] Rule 54 provides:

'(b) Nothing in these rules shall be construed to permit the drilling of any well in such manner as it crosses property lines except in cases where special permission has been granted by the Commission as a result of a hearing on such matter.

"(c) No well hereafter drilled may be *directionally deviated* from its normal course by any means of deviation before the operator shall have secured a permit for the *directional deviation* of the well from the Railroad Commission. . . ."

[6] Starting in 1946, the Commission adopted a policy of inserting "straight hole" clauses in specific Rule Permits where the offset operators requested it. By 1948, the Commission had setfled on a standard "straight hole" clause.

However, the defendants seek to limit the scope of this admission. They contend that knowingly operating an intentionally slanted well drilled prior to April 1, 1949, the effective date of the adoption of Rule 54, and in the absence of a "straight hole clause" is not an offense until there is a valid Commission order finding the well to be in violation of its rule and regulations and directing that the well be shut in. The defendants further argue that under Rule 54, the *unintentional drilling of a slant well* is not an offence; and, that the *intentional drilling of a slant well*, prior to Rule 54 and in the absence of a "straight hole clause" is not an offense. The effect of all of this argument is to say that at no time and under no circumstances has the Railroad Commission, through Rule 37, sought to regulate subsurface drilling. In other words, the defendants contend that Rule 37 does not control bottom hole locations and that Rule 54 was promulgated and use of the "straight hole clauses" in specific Rule permits were adopted in order to cure the "hiatus" in Rule 37. The defendants contend that Rule 54 which requires knowledge and intent is the only rule the State can invoke as a basis for an action for penalties. We do not agree. The question of whether or not, before there can be a penalty assessed, the acts charged must have been committed knowingly and willfully, will be discussed later in this opinion.

A further analysis of Rule 37 is necessary. We direct attention to pertinent provisions of the Rule to show that where the rule speaks of a well being drilled at certain locations on

a tract, it contemplates not merely drilling from the surface; but the subsurface to its bottom hole location. Section (a) of Rule 37, in part, states:

> "No well for oil or gas shall hereafter be drilled nearer than twelve hundred (1200) feet to any well completed *in or drilling to the same horizon on the same tract or farm.*" (Emphasis added.)

Section (a) of State-wide Rule 37, as amended by Hawkins Field Rule 1, further provides that no well for oil or gas shall hereafter be drilled nearer than a specified number of feet to any property line. Section (3) of State-wide Rule 37 prohibits production from a well "which does not conform in all respects to the terms of such permit." The insertion of "straight hole clauses" into Rule 37 orders is strongly indicative of the intention of the Railroad Commission that Rule 37 should cover subsurface drilling. Thus, it is seen that the Railroad Commission could, under Rule 37, adequately cope with illegal deviation without the necessity of depending upon Rule 54. Rule 54 was adopted primarily for the purpose of providing a procedure for the benefit of those who desire to obtain legal authority to drill in a predetermined direction or course. See Stewart v. Humble Oil Co., 377 S.W. 2d 830 (Tex. Sup. Ct., 1964). The rule was never intended to serve as an escape hatch for those who seek to deviate or directionally drill beneath the surface without authority. Early decisions by this Court, among them being Brown v. Humble Oil & Refining Co., 126 Tex. 296, 83 S.W. 2d 935, 938 (1935), render it apparent that the Railroad Commission could not have promulgated and the courts could not

have sustained Rule 37 if that rule was limited so as to only regulate surface drilling. When this Court in Brown v. Humble, spoke of injury to adjoining lands, it was not speaking of injury to the surface alone. The Court, in determining the meaning of the rule, recognized that the basic purpose of the rule was the prevention of waste or confiscation. Therefore, the exceptions which are permitted to prevent waste or confiscation would have no meaning if the surface location only, and not the reservoir location, is the test for a legal and valid well location. The Railroad Commission must have control over where the wells are to be located in the reservoir. Of course, the surface location of the well is important only to the extent that the surface position is fixed with some certainty on the lease. See Lippincott v. Atlanta Refining Co., 128 S.W. 2d 847, (Tex. Civ. App. 1939, error dism. judm. cor.); Atlantic Oil Production Company v. Railroad Commission, 85 S.W. 2d 655 (Tex. Civ. App. 1935, error dism.); Stanolind Oil & Gas Co. v. Midas Oil Co., 123 S.W. 2d 911 (Tex. Civ. App. 1939, error dism.) Trapp v. Atlantic Refining Co., 169 S.W. 2d 797 (Tex. Civ. App. 1943, error refused). In this latter case the Court held that Rule 37, instead of being indefinite, concerns underground conditions as well as surface locations.

The Defendants argue that the statement in Harrington v. Railroad Commission, supra, that ". . . [d]rilling at an established surface location may be a condition of the right to drill, but drilling a straight hole obviously is not" supports their theory that the drilling or operation of a slant well does not violate Rule 37. The statement is not susceptible

of such interpretation when considered in the light of the nature of the suit. In Harrington v. Railroad Commission, 375 S.W. 2d 892, (Tex. Sup., 1964), the Court was concerned with the issue of whether or not wrongful deviations operated to work a forfeiture of the rights granted by the permits involved. In passing upon that question, we were not concerned with the question of liability to a penalty action under Article 6036, since the question of penalties was not before us.

Mining Partnership

We have carefully examined the evidence bearing upon the question of whether or not the Defendants were engaged in a mining partnership as alleged by the State. We have concluded that a mining partnership as to all Defendants was shown as a matter of law. All of the elements of a mining partnership-joint ownership, joint operations, sharing of profits, community of interest and mutual agency representing the mining partnership in management and operation—were provided without dispute. The record shows that the Defendants acquired their respective property interests from the Texas & Pacific Coal & Oil Company in the fall of 1951. These interests were acquired through a "farm-out" agreement with Texas & Pacific. The rights were originally acquired by a series of transactions conducted by Harrington for himself and in behalf of the other Defendants. The rights and interests acquired were later confirmed by legal conveyances. The record shows that each defendant made admissions conclusively establishing that an oral agreement was

entered into before the well was drilled whereby they would own the lease proportionately and would share in the expenses and profits. It is immaterial that conveyances of interests to some of the partners were executed after the well was drilled. There was no written or oral agreement to limit the rights or duties of any one of the defendants so as to preclude liability, responsibility, control, operation or management of the lease. A mining partnership arises by operation of law where co-owners work a mine. See Wagner Supply Co. v. Bateman, 118 Tex. 498, 18 S.W. 2d 1952.

The record shows that the defendants operated under the name of "HAL CO." and worked together from a time before the well was drilled until the dissolution of the partnership long after the well was completed. It is not necessary that a mining partnership be created by mutual agreement or intention, or by mutual selection of the persons comprising the partnership. See 12 Tex. Law Review, 410, 412, 413, 414. The cases relied upon by the defendants involve a general partnership and not a mining partnership.

The requisite element for a mining partnership which seems to create the greatest difficulty is joint operation. From our examination of cases in this and other jurisdictions it seems that this element is absolutely required before a mining partnership arises. This element has been conclusively shown. Each defendant worked and cooperated in every act that was done. Harrington secured the lease, handled the "pooling" of money, paid the pooled money out by paying the expenses of operation, including paying the

pumper and the driller. Harrington secured the forms and furnished necessary information for Baton to make reports to the Railroad Commission. Baton represented to the Railroad Commission that he was the owner and operator of "HAL CO.". Baton furnished the surface pipe when they started the well. Baton admitted, when testifying after being called under the adverse party rule, that all of the defendants were members of the "HAL CO." at the time the well was drilled; that "we drilled the well, Yes, sir"; and that all of the defendants had an interest in the Company, Baton, Allgood and Lutes, in addition to owning an interest in the farm-out or lease from the beginning, looked to Harrington for progress reports. Lutes admitted Harrington acted for all of the defendants in acquiring the lease and that he looked primarily to Harrington. Baton was active in the mining operation from the start. Baton frequently appeared at Harrington's office and signed all reports which had been prepared by Harrington. The defendants paid their proportionate share of the expenses and received their proportionate share of the income in accordance with division orders. There is no denial by any of the defendants of these admitted facts. In this case there was no contract between the defendants except their joint oral agreement to drill and operate. Unquestionably, a mining partnership existed at all pertinent times. See Munsen v. Mills & Garrity, 115 Tex. 469, 283 S.W. 754 (1926); Wagner Supply Co. v. Bateman, supra; Clayton v. Brideport Machine Co., 33 S.W. 2d 787 (Tex. Civ. App. 1930, error ref.), and 12 Texas Law Rev., 410, for additional authorities.

Knowledge—Intent

We have heretofore discussed to a limited degree the contention of the defendants that knowledge or intent is a necessary element which must be alleged and proved and that since the State did not so allege, the judgment allowing a recovery of penalties under Article 6036, supra, must fall.

The defendants argue that Article 6036 is purely a penalty statute and depends entirely upon a reference to rules, orders and regulations of the Railroad Commission to define the act, in this case the unlawful deviation of an oil well. It is further argued that neither the statute nor Rule 37 makes any reference to the deviation of a well and that only with the adoption of Rule 54 in 1949 was deviation of an oil well dealt with in the rules of the Railroad Commission.

We have concluded that "knowledge" or "intent" is not required to be alleged and proved as a necessary element in a civil penalty action under Article 6036. This article authorizes a civil action for penalties. See Patton v. State, 62 S.W. 2d, 381 (Tex. Civ. App. 1933, no wr. hist.) and Waters-Pierce Oil Co. v. State, 106 S.W. 918 (Tex. Civ. App. 1907, wr. ref.) It is an historical fact that the statute, at various times, has been changed so as to either include or exclude from its provisions the words "knowingly and willfully violating". The 1929 statute did not contain these words. In 1934 the statute was changed so as to contain the words "knowingly and willfully violating" any of the provisions of Act or Title 102; or "knowingly and willfully violating the terms of any rule, order or regulation of the Railroad Commission of Texas." In 1935, the statute was enacted with substantially

the same provisions as formerly, except that the Legislature eliminated the elements of knowledge and intent. The defendants rely upon the case of Bloom v. Texas Board of Pharmacy, 390 S.W. 2d 252 (Tex. Sup. 1965) in support of their contention that a proper construction of Article 6036 leads to a holding that scienter, or knowledge, is essential to the right of the State to a recovery of penalties. The statute involved in Bloom did not have this legislative history whereby the words "knowingly and willfully" had been deleted from the statute. Therefore, knowledge and intent under Article 6036, supra, are immaterial.

The State's Application

We come now to the questions presented in the State's application for writ of error.

We have held that as a matter of law the well was drilled for a period of 16 days. It was not error, therefore, for the court to fail to submit to the jury for its determination an issue as to the number of days the defendants were engaged in drilling the well.

The evidence is uncontroverted that the well was illegally operated for more than 3,650 days. The principal argument of the defendants is that the allegations and proof that they maintained the well in an unplugged state for a period of over 3,650 days amounts to no evidence that the well was "operated" for that period of time. In this connection, the Court of Civil Appeals has reversed the judgment of the trial court, holding that the State failed to establish by the uncontroverted evidence that the well was operated in an

unplugged manner for 3,650 days, and that the use of the undefined word "operated" in Special Issue No. 4 was error. We disagree with both holdings. The well remained unplugged and continuously ready to produce its allowable. It was maintained in an operable condition and production was regularly obtained therefrom. The defendants contend that "operation" means only "producing". The words "operated and produced" are not synonymous. The word "operated", as used in the charge, means everything that is done to maintain an oil well so as not to abandon it. We hold, in this case, that the well was being operated and maintained so as to attain the result appropriate to the nature of the enterprise. See Concordia-Arrow Flying Service v. City of Concordia, 289 Pac. 955 (Kan. 1930); Rogers v. Osborn, 250 S.W. 2d 296 (Tex. Civ. App. 1952), reversed on other grounds by this Court, 261 S.W. 2d 311 (1953).

The defendants drilled the well in a deviated manner across a boundary line of their lease. The evidence shows that the well produced its allowable during a period of more than 3,650 days. The well was maintained and operated so that it could produce oil at a moment's notice. The pleadings were sufficient and the evidence introduced thereon is conclusive as to the duration of the operation of the well. See State v. Arkansas Fuel Oil Co., 268 S.W. 2d 311, 316, penalty suit, (Tex. Civ. App. 1954), reversed on other grounds, 154 Tex. 573, 280 S.W. 2d 723 (1955).

The evidence which was heard by the Court after the verdict was received was properly considered since it was evidence on a non-controversial matter. There was no evi-

dence introduced after the verdict which raised a material issue of fact.

The trial court did not define the word "operated" in its charge to the jury. We have examined the defendants' objections and exceptions to the trial court's charge and find that the defendants objected and excepted to "Special Issue No. 4" because of the court's failure to define the word "operated". However, the defendants failed to request in writing and tender to the trial court a definition of the word "operated". Failure to submit a definition under the circumstances was not error. Rule 279, Texas Rules of Civil Procedure. In the case of Yellow Cab and Baggage Company v. Green, 154 Tex. 330, 277 S.W. 2d 92, 93 (1955), we hold that when "the court's charge contains no instruction, the complaining party must accompany his clear and specific objections to such omission with a substantially correct definition or with explanatory instruction."

The judgment of the Court of Civil Appeals is reversed and that of the trial court is affirmed.

Clyde E. Smith
Associate Justice

Associate Justice Griffin dissenting.
Opinion delivered: October 12, 1966

DISSENTING OPINION

(Record, Item XI—officially reported in 407 S.W. 2d 467, 479)

IN THE SUPREME COURT OF TEXAS

No. A-10592

THE STATE OF TEXAS,

Petitioner,

v.

HARRY M. HARRINGTON, JR., et al,

Respondents.

From Travis County, Third District

DISSENT

It is my opinion that the Court of Civil Appeals has correctly decided this case and I agree with that opinion. 385 S.W. 2d 411.

Meade F. Griffin,
Associate Justice

Opinion delivered
10/12/66

JUDGMENT OF SUPREME COURT OF TEXAS

(Record, Item XII)
October 12, 1966

No. A-10,592

THE STATE OF TEXAS,

v.

HARRY M. HARRINGTON, JR., et al,

From Travis County, Third District

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Third Supreme Judicial District, and the original transcript and transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court (Associate Justice Griffin dissenting) that there was error in the judgment of the Court of Civil Appeals, but no error in that of the District Court, it is, therefore, *adjudged, ordered* and *decreed* that the judgment of the Court of Civil Appeals be, and hereby is, reversed and set aside, and that the judgment of the District Court be, and hereby is, affirmed.

It is further ordered that respondents, Harry M. Harrington, Jr., Charles W. Lutes, Reid H. Allgood and J. W. Baton,

pay all costs in this cause expended and incurred in this Court and Court of Civil Appeals; that petitioner, The State of Texas, have and recover of and from respondents, (above named), the costs by it expended and incurred in said Courts, and that this decision be certified to the District Court of Travis County, Texas, for observance.

Order of The

SUPREME COURT OF TEXAS
OVERRULING MOTION FOR REHEARING

(Record, Item XV)
November 16, 1966

No. A-10,592

THE STATE OF TEXAS,

v.

HARRY M. HARRINGTON, JR., et al.

From Travis County, Third District

Motion for rehearing on behalf of respondent Harry M. Harrington, Jr., filed in the above numbered and entitled cause on October 26, 1966, having been duly considered, it is ordered that said motion be, and hereby is, overruled.

SUPREME COURT, U.S.

FEB 9 1967

JOHN F. DAVIS, CLERK

NO. 997

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

H. M. HARRINGTON, JR., ET AL.,
Petitioners

v.

THE STATE OF TEXAS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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SUBJECT INDEX

	Page
Statement of the Case	1
No Real and Substantial Federal Questions Presented to (Invoke Granting of Writ)	6
Answer to Petitioners' Point 1 (Texas Statute Is Constitutional)	8
Answer to Petitioners' Point 2 (The Pleadings Encompassed the Penalty Imposed)	11
Answer to Petitioners' Point 3 (No Error in Deposition Ruling)	15
Answer to Petitioners' Point 4 (No Right of Trial by Jury Denied by Use of Rule 270)	24
Answer to Petitioners' Point 5 (Mass Television and Press Publicity Not Shown in Record)	26
Conclusion	28
Proof of Service	29

CITATIONS

Adams v. United States, 317 U.S. 269, 281 (1943)	26
Beck v. Washington, 369 U.S. (1962)	26
Buchalter v. New York, 319 U.S. 427 (1943)	27
City of Winters v. Bethune, 111 S.W.2d 797 (Tex.Civ.App. 1937, error dism.)	25
Commissioners Insurance Fund v. Lapidus, 182 Misc. 368, 50 N.Y.S.2d 589 (1943)	19
Concordia-Arrow Flying Service v. City of Concordia, 289 Pac. 955 (Kan. 1930)	13, 14
Consumers Gas & Fuel Co. v. Erwin, 243 S.W. 500, 503, (Civ.App. 1922, error ref.)	21
Culver v. Smith, 74 S.W.2d 997 (Civ App. 1935, error ref.)	9, 10
Culver v. State, 85 S.W.2d 997 (Civ.App. 1935, error ref.)	10

Page

Darcy v. Handy, 351 U.S. 454 (1956) 26

Douglas v. City of Jeannette, 130 F2d 652, affirmed 319 U.S. 157 7

Edwards Mfg. Co. v. Southern Surety Co., 283 S.W. 624, 625 (Civ.App. 1926) 20

Ex Parte Ladon, 160 Tex. 7, 325 S.W.2d 121 (1959) 22

Estes v. Texas, 381 U.S. 532 (1965) 27, 28

F. C. Henderson v. Railroad Commission of Texas, 56 F2d 218 (5th Cir. 1932), appeal dismissed 287 U.S. 672 ..... 8, 10

Flannery v. State (Tex.Civ.App.), 85 S.W. (2d) 1052, 1053 10

Fleishman v. State (Tex.Civ.App.), 91 S.W.2d 493 10

Ford Motor Co. v. State, 142 Tex. 5 175 S.W.2d 230 (1943) 15

Gale v. Spriggs, 346 S.W.2d 620, 623-625 (Civ.App. 1961, error ref. n.r.e.) 23

Goss v. Bomar, 337 F2d 341 7

Hall v. Penn. R. Co., Pa. 54, 100 A. 1035, 1040, L.R.A. 1917-F 414 (1917) 15

Horton v. Benson, 266 S.W. 213 (Tex.Civ.App. 1924) 13

John F. Buckner & Sons v. Allen, 272 S.W.2d 929 (Tex.Civ.App. 1954, error dism.) 25

Lowenstein v. Evans, 69 Fed. 908, 911 (C.C., S. Car. 1895) 18

Mathews v. Pyle, 75 Ariz. 76, 251 P.2d 893, 896 (1952) 23

McAdams v. Dallas Railway & Terminal Co., 149 Tex. 217, 229 S.W.2d 1012 (1950) 25

New Orleans v. New Orleans Waterworks Co. 142 U.S. 79 8

Niemann v. Zarsky, 233 S.W.2d 930 (Civ.App. 1950) 17

Noble v. Carlton, Governor of Florida, et al. (D.C.) 36 F. (2d) 967 10

Parker v. McLain, 237 U.S. 469 8

Page

People ex rel Port Petroleum Corporation v. Atlantic Coast Terminals, 1 N.Y.2d 393, 153 N.Y.S.2d 193 (1956) 18

Perkins v. State of North Carolina, 234 F.Supp. 333 6

Prescott-Phoenix Oil & Gas Co. v. Gilliland Oil Co., 241, S.W. 775 (Tex.Civ.App. 1922) 25

Redding v. Pate, 220 F.Supp. 124 7

Reynolds v. United States, 98 U.S. 145 (1878) 27

Rideau v. Louisiana, 373 U.S. 723 (1963) 28

Roco Refining Co. v. State, 94 S.W.2d 1214 (Civ.App. 1936) 10

Rogers v. Osburn, 250 S.W.2d 296 (Civ.App. 1952—case reversed on other points by Supreme Court, 261 S.W.2d 311) 13

Sauermann v. El Paso Electric Ry. Co., 235 S.W. 548 (Comm.App. 1921) 17

Saunders v. Commonwealth Casualty Co., 246 S.W. 613 (Mo.Ct.App. 1923) 14

Sheppard v. Maxwell, 384 U.S. 333 (1966) 27

State v. Arkansas Fuel Oil Co., 268 S.W.2d 311, 316, reversed on other grounds, 154 Tex. 573, 280 S.W.2d 723 (1955) 14

State v. McCord, 203 Ala. 347, 83 So. 71 (1919) 18

State v. Oak Harbor Gas Co., 53 Ohio St. 347, 41 N.E. 584, 586 (1895) 15

Stroble v. California, 343 U.S. 181 (1952) 27

U.S. ex rel Bryant v. Fay, 211 F.Supp. 812, cert. den. 375 U.S. 852 6

Welch v. State, 148 S.W.2d 876, 879 (Civ.App. 1941, err. ref.) 19

STATUTES

Vernon's Annotated Civil Statutes

Article 2293 17

Article 3769 17

Article 6036 ..... 2, 8, 9, 10, 11

BOOKS

54 American Jurisprudence 901-902, Sec. 263, U.S. Courts 26

27 C.J.S 75, Section 29(3) Discovery 18

27 C.J.S. 116, Sec. 35, Discovery 22

27 C.J.S. 224, Sec. 72, Discovery 23

27 C.J.S. 225, Sec. 72, Discovery 22

20 Texas Jurisprudence 2d 149, Sec. 3, Discovery, Inspection, etc. 22

20 Texas Jurisprudence 2d 151, Sec. 7, Discovery, Inspection, etc. 22

NO. 997

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

H. M. HARRINGTON, JR., ET AL.,
Petitioners

v.

THE STATE OF TEXAS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

The State of Texas, Respondent herein, opposes the granting of the Petition for Writ of Certiorari because the Supreme Court of Texas has correctly decided the questions raised by the petition and no substantial Federal questions are presented.

STATEMENT OF CASE

In addition to the statement appearing in the petition, the following information will assist in a proper evaluation of this case.

This is what is commonly known as a Texas "slant-well" penalty suit. The case before the Supreme Court of the United States is a Petition for Certiorari from a judgment of the Texas Supreme Court which affirmed a district court judgment based on a jury verdict. The State of Texas, plaintiff in the trial court, sued Peti-

tioners herein for penalties under the provisions of Article 6036, V.A.C.S., because of violations by Petitioners of rules and regulations of the Railroad Commission of Texas, In the trial court it was alleged and the evidence showed that Petitioners obtained from the Railroad Commission a Rule 37 permit to drill an oil well at a specified location, and violated the permit by drilling the well at its proper surface location and then deviating it under the ground so as to cross the property line to a bottom-hole location on the land of other persons, and thereafter operating said well. (Tr. 45-52)

Said Article 6036 provides for a penalty, against any person violating a Railroad Commission rule or regulation "of not more than $1,000 for each and every" act and day of violation.

The case was tried before a jury, which answered the special issues in favor of the Respondent State of Texas and fixed penalties, based on the days of drilling and operation against each of Petitioners herein in amounts considerably less than the maximum authorized by the statute. The trial court entered judgments in the amounts fixed by the jury. (Tr. 213-215).

The evidence in this case shows that (a) the Railroad Commission issued a permit for the well in question to be drilled at a specified location, (b) that the well was drilled in a deviated manner so as to be bottomed off of Petitioners' lease, (c) that the well was "drilled" and "operated" by Petitioners, (d) that the drilling of the well covered a period of sixteen days, and (e) that the well was "operated" for a period of 3,650 days. We will briefly discuss each of those elements.

(a) It was uncontroverted that on February 29, 1952, the Railroad Commission granted to the HAL Company a Rule 37 permit to drill the Harrington-Texas & Pacific Coal & Oil Co. well No. 1 at a location designated as 234 feet south of the north line and 234 feet east of the west line of a 20 acre tract in the Duncombe Survey in the Hawkins Field, Wood County, Texas (Plf. Ex. 12, S.F. Vol. III).

(b) The evidence showed that the well was "slanted" in that the horizontal displacement of the bottom of the well was 1,664.73 feet in a direction of north 87 degrees 56 minutes west from the surface location of the well, that the vertical depth of the well was 4,737.74 feet, and that the actual length of the bore-hole was 5,090 feet (S.F. 280), and that the bore-hole crossed the property boundary line so that the bottom of the well was in a different tract of property than the surface location where the permit authorized the well to be drilled (Plf. Ex. 44, Vol. III). Although this evidence was uncontroverted, the trial court submitted to the jury the question of whether the well was "bottomed" off of Petitioners' lease; and the jury answered "yes."

(c) The evidence was conclusive that Harry M. Harrington, Jr., Reid Allgood, Charles W. Lutes and J. W. Baton "drilled" and "operated" the well. The permit to drill the well was issued by the Railroad Commission to the HAL Company (Plf. Ex. 12, Vol. III); originally that was the assumed name that stood for Harrington, Allgood and Lutes (S.F. 448 and 593); Baton also became a member of the HAL Company, as shown by his filing of the organization report, the reports on the progress of the well, and his own testi-

mony (Plf. Exs. 10, 13, 14, 15, 17, 18, Vol. III, and S.F. 446-448); and they "were all in on the deal to drill the well" (S.F. 447); they were in a meeting and "agreed" to drill it (S.F. 593); they, according to the positive testimony, "drilled the well" (S.F. 447); the HAL Company's office was Harrington's office in the Bramlette Building, Longview (S.F. 594); the HAL Company through Baton filed the completion report (S.F. 449), and also the production reports (S.F. 451-453); Baton furnished certain pipe for the well (S.F. 455); Lutes hired the pumper and gave him orders (S.F. 425-427); Harrington paid the pumper and other expenses (S.F. 427, 456, 457); Allgood paid his proportionate part of the expenses (S.F. 580); and the others also paid their part (S.F. 581); and said parties had an agreement to share the expenses and receive their proportionate share of the income, and carried out that agreement (S.F. 413, 414, 460, 461, 479; Plf. Exs. 57 and 60, S.F. Vol. III). The evidence conclusively established that Harrington, Allgood, Lutes and Baton were mining partners. Not one word of evidence was offered raising a question or contesting that said Petitioners did not "drill" and "operate" the well.

(d) The evidence was uncontroverted that the period of drilling covered sixteen days, beginning on April 6th, and being completed on April 21st (Plf. Exs. 13 and 14, Vol. III), and the time of drilling was admitted by Harrington (S.F. 612).

(e) The evidence, likewise, was uncontroverted that the well was operated, *by producing and being kept in an unplugged condition so that it could produce,* for a period of more than ten years, towit, 3,650 days,

(S.F. 34, and Plf. Exs. 15 through 28, Vol. III); and the well produced during that time 284,133 barrels of oil (S.F. 34), of a value of $661,482.73 (Plf. Ex. 31, Vol. III). No evidence was offered by Petitioners contradicting those facts.

The trial court submitted the case to the jury by instructing it that in determining the amount of penalties to be assessed against the defendants, (Petitioners herein), it could consider (1) the nature and character of the conduct involved, (2) the degree of culpability of the wrongdoer, (3) the extent to which such conduct offends a public sense of justice and propriety, (4) any heedless and reckless disregard of the rights of others, and (5) the character and extent of the injury inflicted. The trial court then submitted issues by which the jury found that the well was bottomed off of the defendants' (Petitioners') lease, and that the penalty for drilling the well during the sixteen days period should be $266.67 per day against Harrington, Allgood and Lutes each, and the penalty for operating the well during the 3,650 days should be as follows: $31.00 per day against Harrington, $15.50 per day against Allgood, $31.00 per day against Lutes, and $2.50 per day against Baton.

On the basis of that verdict the trial court entered judgment in amounts, bearing interest at six percent per annum, against said defendants (Petitioners herein) as follows: Harrington, $117,416.72; Allgood, $60,841.72; Lutes, $117,416.72; and Baton, $9,125.00 (Tr. 213-215). The Supreme Court of Texas has affirmed the trial court and jury.

NO REAL AND SUBSTANTIAL FEDERAL QUESTION PRESENTED TO INVOKE GRANTING OF WRIT

Petitioners have failed to cite any authority or make any necessary showing of a real and substantial Federal question essential to the jurisdiction of the United States Supreme Court over judgments of a state court. Their mere averment of a Federal question or claim of constitutional right is insufficient in the absence of a showing of a real and substantial Federal question deserving of serious consideration. Petitioners' five cited cases on page 3 of their Application do not justify the exercise of jurisdiction by this Court for certiorari.

In *U.S. ex rel. Bryant v. Fay,* 211 F.Supp. 812, cert. den. 375 U.S. 852, the U. S. District Court of New York actually denied the application for habeas corpus where it was caused to appear that the prisoner applicant's sentence was within the statutory limit which was itself constitutional and in the absence of a proper showing of cruel or unusual punishment or double jeopardy.

The second case cited is *Perkins v. State of North Carolina,* 234 F.Supp. 333, which involved the granting of a writ of habeas corpus by a U. S. District Court of North Carolina upon petitioner's showing that he was not afforded counsel in the state post conviction proceeding. This is not relevant to the case at bar, wherein Petitioner Harrington, a lawyer himself, represents the Petitioners in a civil action for civil penalty, and Petitioners make no such contention of deprivation of counsel.

Next cited is the case of *Goss v. Bomar,* 337 F.2d 341, wherein the Circuit Court actually denied the petition for writ of habeas corpus and refused even to consider the federal constitutional issues averred because not passed upon by the highest state court. These questions involved whether a life sentence without the possibility of parole violated the Eighth Amendment prohibiting cruel and unsual punishment. Surely this case does not support Petitioners and is foreign to the case at bar.

Redding v. Pate, 220 F.Supp. 124, involved the exercise of jurisdiction by a U. S. District Court over a claim under the Civil Rights Act against a warden of a state prison for intentional deprivation of essential medical care. Petitioners do not show or claim that any of their rights have been violated under the Civil Rights Act or any other Federal Act.

The fifth case cited by Petitioners is *Douglas v. City of Jeannette,* 130 F.2d 652, affirmed 319 U.S. 157. Here the proper jurisdictional showing was made in the suit to restrain threatened criminal prosecution in a state court for violation of a city ordinance requiring a license and tax before the petitioner could solicit orders for merchandise. The ordinance on its face was a constitutional abridgment of free speech, press, and religion, none of which rights are claimed to be violated by Petitioners in this civil case at bar.

It is, therefore, apparent that Petitioners have failed to discharge their burden in this case to warrant the exercise of this Court of its jurisdiction to grant certiorari. Not one United States Supreme Court case is cited in support of Petitioners' Application that any

of their constitutional rights have been violated or that the Texas statute is unconstitutional. In fact, no decision of any court is cited which holds to the contrary of the Texas Supreme Court decision below on any issue. Petitioners have wholly failed to show that the decision in this case is not in accordance with the applicable decisions of the Supreme Court of the United States or any other court. There is no showing that the decision of the Texas state court affects the scope of prior rulings of the U.S. Supreme Court; nor is there any showing in law or in fact of any infringement of a provision of the Federal Constitution.

Petitioners do merely aver that the Texas statute (Art. 6036, Revised Civil Statutes of Texas, 1925), is unconstitutional, and as the basis of their showing cite only one case, *F. C. Henderson, Inc. v. Railroad Commission of Texas,* 56 F2d 218, which we will show did not invalidate the Texas statutes, is not in point and is readily distinguishable.

It is, therefore, earnestly submitted that the statute in question on its face is constitutional and contains no defects whatever. Consequently, the mere averment of its unconstitutionality by Petitioners as a real and substantial Federal question without color, foundation or ground therefor is an insufficient showing. *New Orleans v. New Orleans Waterworks Co.,* 142 U.S. 79; *Parker v. McLain,* 237 U.S. 469.

TEXAS STATUTE IS CONSTITUTIONAL

Petitioners argue under Point 1 that Article 6036, Revised Civil Statutes of Texas, is unconstitutional on the theory that the statute is so drastic, severe and extreme as to constitute excessive fines and unusual

punishment, deprives Petitioners of their property without due process of law and denies them free access to the courts.

Respondent takes sharp issue and challenges these contentions because the appellate courts have already held Article 6036, R.C.S. constitutional on the exact grounds now urged by Petitioners in this cause.

Although *Culver v. Smith,* 74 S.W.2d 754, 760 (Civ. App. 1935 error ref.), was a decision rendered before the 1935 amendment to the statute, the very philosophy of the present contentions were examined and the penalty statute, which read the same as the present law in this respect, was held constitutional. In that case this court said:

> "Appellants further contend that the penalties of 'not more than One Thousand Dollars ($1,000.00) for each and every day of such violation' of any provision of the act as provided in article 6036, as amended by Acts of the 42d Legislature, 1st Called Session, c. 26 § 3 (Vernon's Ann.Civ. St. Art. 6036), render the act void as being in contravention of section 13 of Article 1 of the Texas Constitution, in that it *imposes excessive fines and authorizes unusual punishment,* and as being in contravention of section 19 of article 1 of the Texas Constitution, and of section 1 of Article 14 of the Amendments to United States Constitution, in that it permits and authorizes the *deprivation of their property without due course of law, and of their liberty without due process of law.* We do not sustain these contentions.
>
> ". . . *The fact that article 6036 imposes a penalty of 'not more than one thousand dollars per day' instead of a flat penalty of $1,000 per day, thus permitting the imposition of a small penalty of*

perhaps only a few cents per day, has been held to be sufficient within itself to take such statute out of the constitutional inhibitions sought to be invoked by appellants. Noble v. Carlton, Governor of Florida, et al. (D.C.) 36 F. (2d) 967." Emphasis added)

The loose language and dicta of a Federal decision construing the 1931 statute cast doubt upon the words "$1,000 dollars per day"; but, even here the court, in passing upon requested injunctive relief, held the more severe wording valid. *F. C. Henderson v. Railroad Commission of Texas,* 56 F.2d 218 (5th Cir. 1932) appeal dismissed 287 U.S. 672.

The Texas Legislature re-enacted this wording of "not more than" in the 1934 and 1935 Amendments to Article 6036, and the Texas Courts thereafter sustained its constitutionality. *Culver v. Smith,* supra; *Culver v. State,* 85 S.W.2d 997 (Civ.App. 1935, error ref.)

A good summation of the law is found in *Roco Refining Co. v. State,* 94 S.W.2d 1214, 1217 (Civ.App. 1936), in which the Court said:

"Appellants' fourth proposition contends that article 6036, R.S. 1925, as amended by Acts 1931, 42d Leg., 1st Called Sess., p. 46, chap. 26, § 3, is unconstitutional and void, as authorizing unusual and excessive punishment, which is the article of the statute under which appellants are sued.

"This proposition has heretofore been passed upon by this court and determined adversely to appellants' contention, in Fleishman v. State (Tex. Civ.App.) 91 S.W.2d 493. Also in the cases of Flannery v. State (Tex.Civ.App.) 85 S.W.(2d) 1052, 1053, and Culver v. Smith (Tex.Civ. App.) 74 S.W.(2d) 754." (Emphasis added)

Since 1919, the statutory law, now embodied in our present laws as Article 6036, contained the work *"not more than"* preceding the penalty amounts. (See Acts of 1919, Reg. Sess., p. 285, Chapter 155, Sec. 7, at page 287 reading *"not more than Five Thousand ($5,000.00) Dollars"*; Acts of 1929, 41st Leg. Reg. Sess., page 694, Chap. 313, Sec. 4, at page 696 reading *"not more than One Thousand ($1,000.00) for each and every day of such violation"*; Acts of 1931, 42nd Leg., 1st C.S., page 46, Chap. 25, Sec. 3, at page 49 reading *"not more than One Thousand Dollars ($1,000.00)*; Acts of 1934, 43rd Leg., 3rd C.S., p. 120, Chap. 64, Sec. 2, at page 121, reading *"not more than One Thousand Dollars ($1,000.00) for each and every day of such violation, and for each and every act of violation"*; Acts of 1935, 44th Leg., Reg. Sess., p. 180, Chap. 76, Sec. 12, at page 188 reading, *"not more than One Thousand Dollars ($1,000.00) for each and every day of such violation, and for each and every act of such violation."*)

These sound principles of law, as approved by the Texas Supreme Court when it refused writ of error as to the opinion of the Austin Court of Civil Appeals in Culver v. Smith, supra, stand as binding precedent in this case.

THE PLEADINGS ENCOMPASSED THE PENALTY IMPOSED

Petitioners contend under Point 2 that the pleadings of the State of Texas did not encompass maintainence of the oil well in an unplugged state as any illegal "operation" of the well.

The crux of the matter involved is whether the pleadings of the State (Respondent) alleging that the De-

fendants (Petitioners) drilled the well and "illegally *operated* said well for a period of over 3,650 days" were sufficient to support a judgment where the proof showed that the defendants maintained the well in an unplugged state for over 3,650 days.

Paragraph 4, Section (i) of Plaintiff's First Amended Original Petition (Tr. 50) is as follows:

> "1. The Defendants violated Railroad Commission State Wide Rule 37, and actually slanted it across the lease line and into the lands of others; *and the Defendants illegally operated said well for a period of over 3,650 days.*" (Emphasis ours)

There is abundant evidence to show that the oil well was deviated contrary to law, and, therefore, illegal. Rule 37(e) dated May 17, 1950 of the Rules of the Railroad Commission, (Plf. Ex. No. 5; S.F. Vol. III), which was then in effect at the time the well was drilled, reads in part as follows:

> "(e) No well drilled in violation of this rule without special permit obtained, issued, or granted in the manner prescribed in said rule, and no well drilled under such special permit or on the Commission's own order which does not conform in all respects to the terms of such permit shall be permitted to produce either oil or gas, *and any such well so drilled in violation of said rule or on the Commission's own order shall be plugged.*" (Emphasis ours)

The record is clear and uncontroverted that the well was not plugged so as to be incapable of producing oil and was therefore operated, i.e., "maintained" in an illegal condition during each and every calendar day as alleged by Appellee.

The Petitioners are confused insofar as this Point is concerned because they are taking the position that "operation" means only "producing", that is, that the allegation that the Defendants illegally "operated" the well means that they "produced" oil from the well. The word "operated" and "produced" in this case are not synonomous. The word "operated" means everything that is done to maintain an oil well so as not to abandon it. If production is stopped for a day in order to clear the well, it is still in "operation". If production ceases a few days in order to repair the pump, it is still in "operation". Therefore, an allegation in a petition of this kind that the well was "operated" for a certain period of time means that the well was being maintained to attain the result appropriate to the nature of the enterprise, that is, maintained so as to produce and be able to produce oil when appropriate to produce the same.

There are a large number of appellate court cases supporting our reasoning on this point. Some of these decisions hold that it is a question of "maintaining" the devise or enterprise in question. In the case of *Concordia-Arrow Flying Service v. City of Concordia,* 289 Pac. 955 (Kan. 1930), the court said that the words "maintain" and "operate" mean the same thing, and the court explained the word "operate" as follows:

> "To operate an airport is to maintain it in a manner to effect accomplishment of results appropriate to the nature of the enterprise."

Cases that show "operation" mean more than "produce" are *Rogers v. Osburn,* 250 S.W.2d 296 (Civ.App. 1952-case reversed on other points by Supreme Court, 261 S.W.2d 311); *Horton v. Benson,* 266 S.W. 213

(Tex.Civ.App. 1924); *Saunders v. Commonwealth Casualty Co.*, 246 S.W. 613 (Mo.Ct.App. 1923).

In this case the evidence is uncontradicted that the Petitioners unlawfully drilled the well in a deviated manner across a boundary line and then maintained it in an unplugged manner. Respondent's pleadings alleged that Petitioners illegally "operated" the well for said period of time. The evidence shows that it did produce through that time, and being maintained in an unplugged condition all of the time so that it could produce oil at a moment's notice. As stated in the case of *Concordia-Arrow Flying Service v. City of Concordia*, supra, the well was "operated" because it was being maintained "in a manner to effect accomplishment of results appropriate to the nature of the enterprise."

The words "produced" and "operated" clearly and concisely convey the idea of maintaining an active open well. It is not necessary to allege further the negative thereof, that is, that Appellants did not plug the well, thereby violating the said rules and statute.

The true test as to the sufficiency of the pleadings of plaintiff in a statutory penalty case is set out in *State v. Arkansas Fuel Oil Co.*, 268 S.W.2d 311, 316, reversed on other grounds, 154 Tex. 573, 280 S.W.2d 723, (1955), wherein it was stated that the petition need only state *"the essential facts necessary to constitute a violation,"* and *"everything that is required to be proved with such degree of certainty as to enable the accused to plead the judgment rendered in bar of a further prosecution for the same offense."*

It is well settled that in penalty suits the plaintiff's

petition is required to state only such *facts* as will bring the case within the provisions of the statute or the law on which the plaintiff relies: *Ford Motor Co. v. State,* 142 Tex. 5, 175 S.W.2d 230 (1943); *Hall v. Penn. R. Co.,* 257 Pa. 54, 100 A. 1035, 1040, L.R.A. 1917-F 414 (1917); and see *State v. Oak Harbor Gas Co.,* 53 Ohio St. 347, 41 N.E. 584, 586 (1895), which clearly holds that a well is being operated even though not producing.

Petitioners' Point 2 is therefore untenable.

NO ERROR IN DEPOSITION RULING

Point 3 of Petitioners complains because the Court of Civil Appeals affirmed the Trial Court's ruling that Defendants (Petitioners) could not take the written interrogatories of the State of Texas without naming the person to answer the interrogatories. Petitioners fail to cite the Court to any case authority to support their contention of unconstitutionality and we can find no such case.

The instrument served on the Attorney General of Texas by the Defendants (Petitioners herein) giving notice of the Interrogatories propounded to the Plaintiff pursuant to Rule 168, Texas Rules of Civil Procedure, (Tr. 20-28) shows on its face that Petitioners were plainly seeking to take the deposition of the State of Texas without naming any official or employee to answer the questions!

Pursuant to the provision in Rule 168, Texas Rules of Civil Procedure, Respondent (State) filed a motion to strike by which it made written objections within ten days to said interrogatories. (Tr. 30-32) The

grounds were that (1) the deposition of the sovereign State of Texas could not be taken, and (2), in the alternative, (a) the deposition inquired as to the allegations relied on by the plaintiff and such matters should be raised by special exception, (b) said interrogatories asked for the names of the witnesses that the plaintiff intended to use and that is not a proper inquiry by deposition, (c) said interrogatories improperly called for disclosure of information obtained by the Attorney General in his investigation, and (d) said interrogatories improperly called for the plaintiff to open its investigation file; and said objections were directed to each interrogatory. (Tr. 30-32)

Respondent's motion to strike, by which said objections to the interrogatories were made, was sustained, and Respondent was relieved of the necessity of answering said interrogatories. (Tr. 43)

Petitioners contend that without naming a specific person they can take the written deposition by written interrogatories of the State of Texas under the authority of Rule 168, Texas Rules of Civil Procedure which became effective in its present wording on September 1, 1962, on the theory that such is allowed by virtue of the words of the rule which provides that "after a party has made appearance in the cause, or time therefor has elapsed, any other party may serve upon such party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information. . ."

Prior to the adoption of the present Rule 168 it was held that: "From the very nature of the thing a

corporation can act only through its officers and agents, and its deposition cannot be taken." *Sauermann v. El Paso Electric Ry. Co.,* 235 S.W. 548 (Comm.App. 1921). Of course, the same reasoning applies to the State, that is "from the very nature of the thing" a State can act only through its officers and agents, and its deposition cannot be taken.

Prior to the adoption of said Rule 168, which is relied on by Petitioners, the Texas courts had held positively that a statute or rule allowing a party to a suit to take the deposition of an opposing party in the suit did not authorize or permit the taking of the deposition of a corporation, unless the statute or rule specifically provided that a corporation's deposition could be taken. In the case of *Sauermann v. El Paso Electric Ry. Co.,* supra, the Supreme Court of Texas, speaking through the Commission of Appeals, held that an ex parte deposition of a corporation could not be taken under the provisions of an amendment in 1897, and in the course of its opinion the court held that prior to the 1897 amendment Article 2293 did not authorize the taking of the deposition of a corporation that was a party to the suit, even though said Article 2293 provided: "Either party to a suit may examine the opposing party as a witness, upon interrogatories filed in the cause. . .".

In the case of *Niemann v. Zarsky,* 233 S.W.2d 930 (Civ.App. 1950), the Court held that the deposition of a corporation party to a suit *could not be taken,* even though the statute, to wit, Article 3769, R. S., which is now section (j) of Rule 188, T.R.C.P., provided that ". . . any *party* to a suit *wherein a corpora-*

tion is a party shall have the right to take written and oral depositions of any *party* to such suit. . .".

The holding in the case at bar is the uniform holding in other states. In 27 C. J. S. 75, Section 29(3) Discovery, it states:

> "In the absence of statutes so providing, the state, when a plaintiff, may not be required, through its officers and agents, to submit to an examination before trial on request of defendant."

In accord are *State v. McCord,* 203 Ala. 347, 83 So. 71 (1919), and *People ex rel Port Petroleum Corporation v. Atlantic Coast Terminals,* 1 N.Y.2d 393, 153 N.Y.S.2d 193 (1956).

Rule 168, Texas Rules of Civil Procedure, as relied on by the Petitioners, provides that any "party" may serve on the other "party" written interrogatories "to be answered by the party served or, if the party served is a public or private corporation . . ., by an officer or agent, who shall furnish such information as is available to the party . . ." That provision might require a corporation to give anwers to a deposition, but it does not require the State to give answers to a deposition. The State is not a corporation. In the case of *Lowenstein v. Evans,* 69 Fed. 908, 911 (C.C.,S.Car. 1895), the Court said:

> "The State is not a corporation. A corporation is a creature of the sovereign power, deriving its life from its creator. The State is a sovereign having no derivative powers, exercising its sovereignty by divine right. The State gets none of its powers from the general government."

On this subject of whether a statute or rule that

provides for the taking of the deposition of a "public corporation" includes the State so as to authorize the taking of its deposition, it was held in the case of *Commissioners Insurance Fund v. Lapidus,* 182 Misc. 368, 50 N.Y.S.2d 589, (1943) that the State was not a "public corporation".

Such is clearly the law in Texas. In *Welch v. State,* 148 S.W.2d 876,879, (Civ.App. 1941, err, ref.), wherein the court held:

> "While in a latitudinous sense, the State may be found within the letter of the phrase 'municipal corporation,' yet, as generally used in law literature and in legislation, we do not think such is true; especially in view of the clearly indicated constitutional meaning of the phrase, we do not think it is true with reference to legislation in this State."

Prior to the adoption of the present Rule 168, the law was clear that the deposition of a corporation and of the State could not be taken. The fact that Rule 168 has a special provision that the deposition of corporation parties can be taken, but does not provide for the State's deposition to be taken, clearly indicates that the makers of the Rule intended that the law as to taking corporations' depositions was to be changed, but that the law as to taking the State's deposition was to remain the same.

The entire argument of Petitioners is that the source of Rule 168 is Federal Rule 33 and that the Federal courts have held that since Rule 33 was adopted, the depositions of the Federal Government, when a party, could be taken under Rule 33 by an opposite party. But it has never been a constitutional requirement that the

state or Federal Government are bound to depose in the absence of a specific rule or statutory requirement.

Rule 168 is not a complete verbatim copy or adoption of Federal Rule 33. It is a rule that brings together already existing provisions of Rules 186a, 186b, and 188, T.R.C.P., providing for the taking of the depositions of opposite parties in a suit, with the added provision for the taking of the deposition of a corporation.

Petitioners' contention that the enactment by the State of a statute or rule similar to a pre-existing Federal statute or rule requires the State to follow the Federal court decisions on the subject is patently fallacious. Petitioners' reasoning is based on a fallacy because it erroneously assumes the absence of pertinent Texas cases.

In the case of *Edwards Mfg. Co. v. Southern Surety Co.*, 283 S.W. 624, 625 (Civ.App. 1926), the court held that the spirit and policy of the law of the state adopting the statute controlled over the construction given by the jurisdiction from which the statute was taken; and in that case the court said:

> "... the rule which presumes the Legislature borrowing a statute adopts also the construction which it had received, is not without qualification and limitation. *If it appears that the construction adopted in the jurisdiction, from which the statute is taken is contrary to the spirit and policy of the jurisprudence of this state, such construction will not be applied.* 25 R.C.L. 1073, 1074. There are many cases in which application of the rule under consideration has been refused."

The same ruling on the law was made in the case of

Consumers Gas & Fuel Co. v. Erwin, 243 S.W. 500, 503 (Civ.App. 1922, error ref.).

The foregoing authorities clearly hold that Texas did not adopt the decisions of the foreign jurisdiction from which the statute or rule was taken, where there are Texas decisions showing the "spirit and policy" of the Texas law on the subject. Texas decisions clearly show that because of the nature of things the deposition of a corporation cannot be taken, and the same rule applies to the State, unless specific authority is granted for the taking of such deposition. Authority to take the State's deposition has not been granted in Texas.

There was another reason why the Petitioners could not take the State's deposition in this case. Petitioners improperly sought by said interrogatories to obtain from Respondent its legal theories as to violations and other information in support thereof. The only proper and authorized way to obtain this type of information was by special exception to Respondent's pleadings; by such method more detailed pleadings could have been required so as to furnish the legal theories, the rules violated, and sufficient information thereon to provide Petitioners with fair notice. To the extent of Petitioners failure to make use of such remedy to obtain the information sought, they must be deemed to have waived their right thereto in that connection under the express wording of Rule 90, Texas Rules of Civil Procedure.

Also, Petitioners improperly sought by aid of interrogatories to obtain information that was privileged, such as confidential statements, names of witnesses, and other matters constituting the attorney's "work prod-

uct" obtained and prepared by the Attorney General and his assistants in their investigation and in anticipation of the trial of such penalty suits, such as the one in the case at bar. The elemental rule prohibiting this improper use of discovery is stated in 20 Tex. Jur.2d 151, Sec. 7, Discovery, Inspection, etc., towit:

> "Discovery procedure cannot be used to deprive parties of the immunities and privileges to which they are otherwise entitled."

It is also stated in 20 Tex.Jur.2d 149, Sec. 3, Discovery, Inspection, etc, that, ". . . a bill of discovery will not lie to discover the names of an adversary's witnesses." This rule was fully discussed and followed, and the Federal rule rejected, in the case of *Ex Parte Ladon,* 160 Tex. 7, 325 S.W.2d 121 (1959).

In 27 C.J.S. 225, Sec. 72, Discovery, the applicable general rule is well-stated as follows:

> "In general, documents of a client in the hands of an attorney are privileged from production or inspection at the instance of third persons, as are documents or matters which constitute part of the work product of the adverse party or his counsel in connection with the preparations for the trial, that is, any data and material obtained or prepared by the adverse party, his counsel, or some other person on his behalf, in anticipation of litigation or in the preparation for trial . . ."

The fact that the plaintiff was the State of Texas or that the remedy was sought against the Attorney General did not prohibit this general rule from being applicable, as shown in 27 C.J.S. 116, Sec. 35, Discovery, wherein it is clearly stated as follows:

> "Generally, the *information received* or the rec-

ords made thereof *by public investigating officials* is not subject to disclosure or inspection in a pre-trial discovery proceeding . . ." (Emphasis ours)

Petitioners had the burden under their discovery process to bring themselves within some unusual exception to this general rule, which they wholly failed to do. Petitioners were seeking to obtain a class of records, that is, Respondent's evidence, confidential communications and papers not required by law to be kept, which were not public records and which class of records are generally held not to be subject to the right of inspection or disclosure by the adverse party. 27 C.J.S. 224, Sec. 72, Discovery. See also the holding and discussion in the case of *Mathews v. Pyle,* 75 Ariz. 76, 251 p.2d 893, 896 (1952), wherein the court held that the documents concerning the Arizona Attorney General's investigation of the affairs of the office of State Land Commissioner were not public records subject to inspection by any citizen.

Lastly, we wish to call to this Court's attention the fact that there is no showing, or even a contention, that the Petitioners suffered any harm or injury as a result of their not being allowed to take the deposition of the State of Texas. The burden to show *abuse of discretion* and *probable harm or prejudice* from the record made in discovery proceedings under such rules as Rule 167 or 168, T.R.C.P. is upon Petitioners, who have herein failed to discharge such burden under Rule 434, T.R.C.P. *Gale v. Spriggs,* 346 S.W.2d 620, 623-625. (Civ.App. 1961, error ref. n.r.e.). The record in this case actually reflects that Petitioners received all of the information which they sought, and to which they were entitled from the amended pleadings of Peti-

tioners filed in advance of the trial. Petitioners have wholly failed to show any harm resulting to them from not receiving such information earlier at the pre-trial hearing.

No Right of Trial by Jury Denied By Use of Rule 270

Petitioners' Point 4 is that the application of Rule 270, Texas Rules of Civil Procedure, to their case in effect deprived them of a jury trial in violation of the Fourteenth Amendment of the U.S, Constitution. The rule reads:

> "Rule 270. Additional Testimony
>
> At any time the court may permit additional evidence to be offered where it clearly appears to be necessary to the due administration of justice. Provided in a jury case no evidence in a controversial matter shall be received after the verdict of the jury."

The Supreme Court of Texas has found and held that in the case at bar no evidence on a controversial matter was received. The basis of this is that there was no testimony or evidence introduced in the case by Petitioners to show that it took less than their self-admitted sixteen days (Plaintiff's Exhibits 13 & 14, S.F. Vol. III, being certified copies of the official well record and completion reports signed by one of the Petitioners) to drill the well and which was acknowledged by Petitioner Harrington in the deposition taken of him prior to trial (S.F. 607, 609, 612, 613). The 3,650 days the well was operated unplugged was also undisputed (S.F. 34, Plaintiff's Exhibits 15 through 28, Vol. III), and no controverting testimony

or evidence was offered by Petitioners of a lesser number of days of operation.

Prior to the entry of the judgment, Respondent filed its Motion under Rule 270 for admission of additional evidence of a non-controversial nature (Tr. 176-179), as did one of Petitioners (Tr. 182-185). Both motions were granted (Tr. 213-215), and Petitioners introduced their additional evidence (S.F. 599-602) as did Respondents (S.F. 607). Respondent's Motion gave Petitioners complete notice of the evidence to be offered (Tr. 175) well in advance of the hearing (S.F. 603). The evidence was not controverted by Petitioners and was conclusive. It could not, therefore, be a controversial factual matter requiring the jury's determination.

Rule 270 has long been upheld in Texas courts as a proper procedure and proper due process. *Prescott-Phoenix Oil & Gas Co. v. Gilliland Oil Co.,* 241 S.W. 775 (Tex.Civ.App. 1922); *McAdams v. Dallas Railway & Terminal Co.,* 149 Tex. 217, 229 S.W.2d 1012 (1950). The trial court ruling will not be reversed in the absence of a showing of abuse of discretion, *John F. Buckner & Sons v. Allen,* 272 S.W.2d 929 (Tex.Civ.App. 1954, error dism.), which is not shown in the case at bar. Petitioners have failed to cite any case anywhere to show that the application of such a rule violates the due process clause of the Fourteenth Amendment of the U.S. Constitution, and we can find no such case.

The filing by Petitioners of a general denial in their pleadings does not render undisputed evidence as "controversial" under Rule 270. *City of Winters v. Bethune,* 111 S.W.2d 797 (Tex.Civ.App. 1937, error dism.)

Petitioners' Point 4 is thus clearly without merit, and no required basis is shown for this Court to exercise its jurisdiction on application for writ of certiorari.

Mass Television and Press Publicity Not Shown in Record

Petitioner's Point 5 is that the mass of television reports and press releases deprived them of a fair and impartial trial is wholly without merit. Nowhere in the record is any showing whatever made of any prejudical television or press publicity which was calculated to deprive petitioners of a fair trial before fair and impartial jurors. This issue was never presented to the trial court, intermediate appellate court or the Supreme Court until Petitioner's Motion for Rehearing in the latter Court. No evidence or proof was there presented and none is presented here. Thus, such a matter not properly urged below will not be considered here in an application for writ of certiorari. 54 Am. Juris. 901-902, Sec. 263, U.S. Courts.

Unless the alleged adverse publicity is shown by the record to have fatally infected the trial, there is no basis for the court to infer or presume that such publicity made petitioner's trial a meaningless formality. *Beck v. Washington,* 369 U.S. 541 (1962).

The burden of showing essential unfairness is upon the petitioner who claims such injustice and seeks to have the result set aside, and the showing must be a "demonstrable reality," not just speculation. *Darcy v. Handy,* 351 U.S. 454 (1956); *Adams v. United States,* 317 U.S. 269, 281 (1943).

Petitioner must show just how the publicity prejudiced the jury in arriving at their verdict and he should move for a change of venue or show at some stage of the trial proceedings that some juror was in fact prejudiced by the publicity. *Stroble v. California,* 343 U.S. 181 (1952). There must be a "convincing showing of actual bias on the part of the jury." *Buchalter v. New York,* 319 U.S. 427 (1943); *Reynolds v. United States,* 98 U.S. 145 (1878).

Petitioners have wholly failed in every respect. The case at bar was not televised, and there was no motion or attempt by petitioner at any stage of the trial proceedings to have the court transfer the venue. No juror was challenged on the ground of prejudice, and no complaint was made to the court to limit the press or publicity coverage. This was a civil penalty case, not a criminal case as were *Estes v. Texas,* 381 U.S. 532 (1965) and *Sheppard v. Maxwell,* 384 U.S. 333 (1966). Petitioners do not show themselves to be notorious persons who had been the subject of great publicity during a highly publicized trial. No occurrences are shown at or during the trial, or in pre-trial proceedings. The *Estes* and *Sheppard* cases are not in any way analogous, wherein a showing was made of a "carnival atmosphere" at the trial, unlimited presence of the press there, and the failure of the trial judge, upon proper request of the defendant's counsel, to control and limit the press attendant there, where full verbatim testimony of the witnesses was made available to them during the trial.

In the absence of a showing of *specific prejudice,* this Court has refused to reverse a lower court on due process grounds based on such a charge of mass

publicity precluding a fair trial. It is only in a televised criminal case, where the defendants themselves were shown to the public, that this Court could find inherent prejudice for reversal. *Estes v. Texas*, supra; *Rideau v. Louisiana*, 373 U.S. 723 (1963).

For all of the above obvious reasons, Petitioner's Point 5 is absolutely untenable.

CONCLUSION

Respondent asks that the petition for writ of certiorari be denied, because the questions raised in the petition were correctly decided by the Supreme Court of Texas, and clearly no substantial Federal questions are presented in this Court.

Respectfully submitted,

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PROOF OF SERVICE

I, Roger Tyler, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of February, 1967, I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari on H. M. Harrington, Jr., attorney for Petitioner, by mailing a copy in a duly addressed envelope, first class mail, postage prepaid, at the address of 324 Bramlette Building, Longview, Texas.

Roger Tyler
ROGER TYLER